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HAGYMASI et al. v. COLONIAL WESTERN AIRWAYS, INC., et al.

(....., N. J., ..., 1931.)

Charge of Court to Jury

DUNGAN, J.

Gentlemen, we are trying six suits arising out of an airplane accident which occurred at the Newark Airport in this city and county on the 17th day of March, 1929, in which fourteen persons, passengers in the plane, were killed, and the pilot, Lou Foote, the only other occupant of the plane, was severely injured. These suits are by the administrators ad prosequendum—that means appointed to prosecute these suits—of the estates of William Steever, Gertrude M. Steever, Raymond Helmstetter, William Ziser, Frank Hagymasi and Stephen Hagymasi, to recover damages on account of the death of those six persons, for the benefit of their next of kin, against the defendant Colonial Western Airways, Inc.

Colonial Western Airways, Inc., was the owner of a tri-motored Ford airplane which was being operated for what is known as hopping trips with passengers from the Newark Airport over the City of New York and back to the Newark Airport on the day the accident happened, and several trips had been made in safety prior to the one during which the fatal accident happened. The take-off was from the northwest runway in a northwesterly direction, the wind being approximately from that direction, some of the witnesses saying that it was west of northwest, or west northwest. The velocity of the wind at that time admittedly was from 34 to 39 miles an hour, some of the witnesses saying it was a steady and others that it was a gusty wind.

As indicated, there were fifteen persons in the plane. The pilot says that the plane took off perfectly except that he noticed it did not gain altitude as quickly as it had on previous flights.

After the plane had passed over State Highway Route No. 25, which is to the northwest of the airport and at the boundary line of the airport, the witnesses differing as to the distance beyond that road, the plane circled or made a turn to the right and continued to circle or made another turn to the right near or beyond the ramp leading to South Street in the viaduct which is a part of Route No. 25. So at the completion of the continuous right turn, or the second turn to the right, as the case may be, it was flying practically in the opposite direction from which it had taken off.

About the time or shortly after the completion of the turn to the southeast, which was toward Route 25 and in the direction of the Central Railroad tracks, one witness, Brown, says before the first turn at least one of the motors failed, all of the witnesses agreeing except Maus and Densinger, who say it was the right one, that it was the left out motor; and Foote, the pilot, says that almost immediately after the left out motor failed the center motor reved down to 800 revolutions, while the previous maximum speed was around 1,700 to 1,800 revolutions per minute. The result of this was that the plane commenced to lose altitude, and the efforts of Foote from that time on failed to result in maintaining altitude. The plane continued to descend until it came in contact with the top of a gondola car loaded with sand on the tracks of the Central Railroad and, as the aviators express it, cracked up with the result already indicated.

The mere fact of the occurrence of this accident with its fatal results does not entitle the plaintiffs in this case to your verdict. More than that must appear. They are not entitled to your verdict unless it appear by the preponderance of the evidence—that is, by the greater weight of the evidence—that these deceased persons could have recovered if deaths had not ensued.

You know that prior to 1776 this part of our country was a colony of

England. By the Declaration of Independence and as the result of the Revolutionary War, our country became independent of the mother country England, but by reason of their previous relationship the common law of England was adopted as the legal system of this country and the various states composing it until the law should be changed by statute or otherwise.

At that time no right of action survived the death of a person caused by wrongful act, neglect or default of another, so that no action such as this could have been brought at that time either in England or in this country. That continued to be the law of England until 1846, when there was passed by the English Parliament what is known as Lord Campbell's Act, which provided that such an action might be brought in any case in which the party injured might have maintained an action and recovered damages in respect thereof had such person survived. New Jersey was, I think, the second state of the United States to adopt a similar act, and in the year 1848, only two years later, the legislature of this state adopted the following act: That whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured. This suit is brought by virtue of the provisions of that act, and unless the persons injured, had they survived, could have maintained this action, the plaintiffs in this action are not entitled to your verdict.

The persons injured could have maintained an action in respect to their injuries only if it appear by the preponderance—that is, by the greater weight—of the evidence in this case that the accident was caused through the negligence of the defendant or the pilot Foote or one of its other employees, in one or more of the facts or omissions charged against it in the plaintiffs' complaint.

Actionable negligence may be expressed either in terms of fault or neglect. Rather a terse definition, I think, of negligence is that it is the doing of an act which a reasonably careful and prudent person would not do under the same or similar circumstances and conditions, or it is the failure to do what a reasonably careful and prudent person should have done and ordinarily does do under the same or similar circumstances and conditions.

In your consideration and determination of this case you should not permit yourselves to be influenced in the slightest degree by sympathy or prejudice. Of course every person who has heard this case does sympathize with those relatives who have lost through death in this accident the association of these five young men and this young woman, who were instantly killed admittedly as the result of this accident. Your oath and mine, notwithstanding our sympathy, are substantially the same. The oath of the judge is that he will administer justice with impartiality. Your oath is that you will find a verdict according to the evidence, and that excludes, as I have already said, both sympathy and prejudice. The question is: What does the evidence in this case prove? What does the evidence in this case show?

The province of the judge in a case of this kind is to decide the questions of law which arise, and in the charge to apply the principles of law upon which you should decide this case to the facts. If any mistake of the judge should occur which is prejudicial to either party, the parties may take advantage of that mistake of the judge, and if it is sufficiently serious it may result in a reversal of the judgment in the case. Your province, which is quite separate and distinct from that of the judge, is to decide the questions of fact. If you make a mistake, your mistakes may be even more serious than those of the judge because there is no stenographer, there is no check upon your consideration of this case when you go to the jury room. So you ought to be, and I am sure will be, animated by the highest motives in your consideration and determination of this case.

I said the functions of the judge and the jury were separate and distinct except that you are obliged to apply to the facts and to your consideration

and determination of this case the law as it shall be given to you by the Court.

In weighing evidence you are not necessarily to be controlled by the great number of witnesses who testify in favor of or against a certain fact or number of facts in the case. You had the opportunity to observe these witnesses, to consider their knowledge of the facts about which they testified, their interest in the case, their impartiality, their fairness, their honesty, and it is for you to say which witnesses you will credit and to what extent you will credit their testimony. Of course when you find witnesses to be of equal degree of credibility, then numbers is an element which you should take into consideration in determining where the weight of the evidence lies.

A number of experts have been produced in this case, expert flyers, expert mechanics. The evidence of these experts should be judged much the same as that of other witnesses as to their fairness and impartiality, to which may be added their experience and knowledge of the subject upon which they testify as experts and the reasons they may give for their opinions, whether or not they are convincing or otherwise.

As has been suggested to you in the argument, in considering the evidence of a witness we have a maxim in law applicable to the trial of cases, *"Falsus in uno, falsus in omnibus,"* meaning in plain English that where a witness is deliberately false in one matter of testimony, you are justified in disbelieving everything that witness has said. Now, that does not mean, of course, gentlemen, that if a witness is apparently testifying honestly, to the best of his knowledge and belief, that you are justified in disbelieving everything he says, that a mere mistake upon one point justifies you in disbelieving him. It is only where you believe that he has wilfully testified falsely upon any given point. Therefore I say if you believe that any witness has so testified, you will be justified in disbelieving eveything he says unless his testimony be corroborated by other credible testimony in the case.

Statements of counsel made during the trial of the case, or even statements or comments by the Court, are not to be regarded by you as evidence, and even opinions of the evidence expressed by the Court are not controlling upon you. The Court may express an opinion, but if your opinion should differ from that of the Court, his opinion may be entirely disregarded by you. Nor should evidence stricken out be considered by you in your determination of this case.

During the trial of this case you have heard much said about unavoidable accident and errors in judgment, and upon that subject I would say that an unavoidable accident is one which prudence and foresight could not have anticipated. So in this case if it should appear, after considering all the facts in this case, that this case was an accident which ordinary prudence could not have foreseen and provided against, then the plaintiffs would not be entitled to your verdict; and if you should decide that when an emergency occurred, if you decide that it was an emergency which caused this accident, then I say to you that a mere error in judgment when a person is confronted by sudden and unexpected danger which reasonable foresight could not have anticipated, that person, or the corporation which is liable for the negligence of that person, would not be liable for such error in judgment, unless that emergency, that danger, was created by the negligence of the pilot himself.

Another situation to which the Court should call your attention is that of assumption of risk. All the passengers in this plane assumed the risk of all the usual and ordinary perils and risks of airplane travel, all the dangers which could not be averted by the exercise of that degree of care which the law imposed upon the defendant, which was reasonable care. If the defendant exercised the diligence, care and skill required by law, the defendant is not responsible for the accident notwithstanding its occurence with all its fatal consequences, and in that event your verdict should be in favor of the defendant.

The degree of care required is, as stated, reasonable care. The defendant was not an insurer that an accident, even one in which there were fatal results, would not occur, but it did owe to its passengers the duty to take reasonable care for their safety; that is, to take reasonable care to provide

a plane that was properly constructed, not such a one as to make an accident impossible, but one which was properly constructed according to the state of the science of building airplanes at that time, to have it carefully inspected at reasonably frequent intervals, to have it properly maintained and kept in good condition, to provide and have it operated by a competent pilot, and to have it properly and carefully operated. The elements of negligence are quite different in some particulars from those in automobile cases, so many of which you have heard during your term of service, where accidents many times can be averted by the lessening of the speed and the stopping of the automobile. The principles with the airplane are exactly the opposite. The lessening of speed and the stopping of the power upon the airplane create a greater danger, according to the proofs in this case, rather than a less danger.

I have said that the degree of care required in the particulars I have mentioned on the part of the defendant in this case was reasonable care. Our courts have said that in the case of passengers transported for hire by a common carrier, reasonable care means and imposes upon the carrier the obligation to exercise a high degree of care. So it may be important for you in this case to determine whether or not this plane at the time this accident occurred was being operated by the defendant as a common carrier for hire.

Our courts have defined common carrier in many cases, but I think perhaps as good a definition as is contained in any of them is in the case of Schott v. Weiss, 92 Law at p. 494 to p. 495, where the Court says: "Common carriers of passengers are those who undertake to carry all persons indifferently who apply for passage. To constitute one a common carrier of passengers it is necessary that he hold himself out to the public as such."

Applying that law to the facts in this case, Mr. Ingold, the first witness in this case, who said that he was the ballyhoo man, you will remember, upon this day, and had been for sometime before, although that is disputed and there is evidence to the effect that he was first employed on the day before this fatal accident, said that he was told to go out and get the dough, to get the passengers and get them regardless of how or when; that Ackerman, who was in charge of the selling of tickets, gave him no instruction of what words to use; that they sold tickets to anyone who came along; that they never refused anyone.

Mr. Wtorkowski, who was the mechanic of the defendant company, was the man who admitted the passengers to the planes, and he says that if they were half intoxicated he did not admit them to the plane but he had to let them in if they were natural and not noisy, indicating perhaps (it is for you to say whether or not it indicates) that anybody who applied was admitted to this plane except someone who was obnoxious. There is no question but that every passenger who applied and flew in that plane, except Parsons, who was a friend of Capt. Wetherdon, had paid $5 for that flight.

Capt. Wetherdon, who was the superintendent of the defendant company, says in respect to their acceptance of passengers, "If an intoxicated person came up we returned his money. If he got a ticket unknown to us, or if somebody came up who was obnoxious, we would return his money. Well, generally if I didn't feel like taking anybody, I didn't have to. It was my discretion who I took." Mr. Ackerman testified that "a good many people were refused at the ship and sent back to me to refund their money."

Applying this evidence on both sides of this question, it will be for you to say whether or not upon this occasion the defendant held itself out to the public as a common carrier by carrying all persons indifferently who applied for passage.

Now, a common carrier is not obliged to accept obnoxious persons, a person who is intoxicated or whose presence in the airplane might endanger the safety of the ship to the other passengers, and indeed the rules of the Department of Commerce provide that a pilot's license may be suspended or revoked for carrying passengers who are obviously under the influence of intoxicating liquor, cocaine or other habit forming drugs. So the fact that the carrier excludes such persons does not deprive it of its status as a common carrier.

As to the degree of care which should have been exercised by the defendant, it is a well known maxim of law that the greater the danger the greater the care required.

Commenting upon the plaintiffs' tenth and eleventh requests, which are that "The due care from a common carrier and its servants toward passengers in their charge is a high degree of care to protect them from dangers that foresight can anticipate. By foresight is meant not knowledge absolute nor that exactly such an accident as has happened was expected or apprehended, but rather that the characteristics of the accident are such that it can be classified among events that without due care are likely to occur, and that due care would prevent." Those are correct requests to charge.

The burden of proving that due care was not exercised by the defendant is upon the plaintiffs. So when you go to the jury room the first question which you ought to ask yourselves is: Does the preponderance of the evidence show that this accident resulted because of the failure of the defendant to exercise and to have exercised by its employees that degree of care which the law requires?

All negligence is not actionable, but negligence in a case of this kind to be actionable must have proximately resulted in the accident which occurred and which resulted in these deaths.

Proximate cause has been defined in the case of Kelson v. Public Service Railway, which is found in 94 Law 527, at p. 529, to be "The cause that necessarily sets the other causes in operation. It is that cause which naturally and probably led to, and which might have been expected to produce, the result which occurred." I will repeat that. I think it is important. "Proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. Proximate cause is that cause which naturally and probably led to, and which might have been expected to produce, the result."

In 1928 our legislature passed an act concerning aircraft, prescribing the qualifications of operators thereof, and providing penalties for violations, the fourth section of which says this: "The public safety requiring, and the advantages of uniform regulation making it desirable, in the interest of aeronautical progress, that a person engaging within this State in operating aircraft, in any form of avigation for which a license to operate aircraft issued by the United States Government would then be required if such avigation were interstate, shall have the qualifications necessary for obtaining and holding such a license, and it shall be unlawful for any person to engage in operating aircraft within this State, in any such form of avigation, unless he shall have such a license."

Section 6 provides, "The public safety requiring, and the advantages of uniform legislation making it desirable, in the interest of aeronautical progress, that aircraft to be avigated within this State shall conform with respect to design, construction anl air worthiness to standards then prescribed by the United States Government with respect to avigation of aircraft subject to its jurisdiction, it shall be unlawful for any person to avigate an aircraft within this State unless he is registered pursuant to the rules and regulations of the United States Government then in force, if the circumstances of such avigation are of a character that such registration would be required in the case of interstate avigation," thereby referring to the licensing and control of aircraft by any of the departments of the United States Government.

On the 20th day of May, 1926, there was adopted by the Congress of the United States an act which referred this whole matter to the Department of Commerce and permitted the Department of Commerce to make certain rules with reference to aircraft, air pilots and the avigation of aircraft. Among those rules was one which required that a licensed airplane shall be given a line inspection by the owner or a licensed mechanic at least once within each twenty-four hours preceding the flight, and that required several things to be done which you have heard referred to during the progress of this suit. It also required that after each one hundred hours of flight, in addition to the line inspection, the airplane must be given a periodic inspection by the owner, and that included engine installation, control systems throughout,

propeller alignment, fuselage, including fittings, tail skid and tail skid shock absorber. In addition to that it provided for the suspension or revocation of the aircraft license for operating with passengers in excess of the original designed seating arrangement and also provided for the suspension or revocation of the pilot's license for piloting aircraft carrying passengers in excess of the original designed capacity of the aircraft, except that infants under two years of age are excepted, provided the maximum useful load is not exceeded.

Now, there is another provision to which perhaps I ought to call your attention—that a licensed pilot authorized to transport passengers for hire shall not do so in a type of aircraft which he has not previously operated within the last preceding ninety days for at least two hours, including ten landings, three of which must have been to a full stop.

The effect of the violation of the New Jersey statute and of any one of these rules is not negligence. I mean by that that the violation of any one of these rules is not negligence in itself, but the reason they are called to your attention is this: Our courts have held that danger reasonably to be foreseen is a test of negligence, and that when statutes are passed and when rules are adopted, such as these, the effect of them is to warn persons that it is dangerous to operate aircraft other than in accordance with these rules, and that the effect of them is to cause a person operating aircraft to foresee the danger of the violation of such statutes and rules. Therefore, when an accident occurs—and note this point—as the result of the violation of such statutes and rules, it is always a question which a jury may take into consideration as to whether or not their violation was not negligence; but of course the results of such violation must have been, as I have already said to you, the proximate cause of the accident in order for you to take them into consideration and for them to have any effect upon your decision of the matter.

Now, let us take up the condition of the plane, Capt. Wetherdon says that the plane itself was in perfect condition, and I recall no evidence in this case from any witness for either the plaintiff or the defendant, so far as the plane itself is concerned, which would negative that assertion by Capt. Wetherdon, which is also corroborated by Mr. Wtorkowski. I am referring now to the plane exclusive of the engine.

As to the condition of the engine, Capt. Wetherdon made no examination, no careful, critical examination of that engine. From a superficial examination of the engine and from its operation he said it appeared to be in perfect condition.

Mr. Shaw, who rode in that plane that day, testifies that prior to the take-off he saw several men in front of the left-hand motor looking at it, that he had noticed the tachometer when these motors were being reved up, and he noticed that there was some variation in that tachometer which did apply to the other motor, the right-hand motor, when it was being tested. This was while the motors were being tested; but he admitted that when this plane took off the tachometer registered steadily and registered the same as the other tachometer, the tachometer for the other motor.

Mr. Wtorkowski, who from the time that plane came here in October, 1928, had had no other business but the care of that plane, testified to his qualifications as a mechanic. He testified that he made the twenty-four-hour inspections before each flight as required by the rule of the Department of Commerce which I have read to you, and that upon this occasion and within twenty-four hours of this flight he made that inspection and he found the plane to be in good condition. He also testifies that he made the inspection which is required by the rule of the Department of Commerce to be made every one hundred hours of flight, at the end of every twenty hours of flight, and that he had made that inspection within a little more than a week of the time of this flight, during which the plane had run something more than ten hours, less than twenty hours.

Mr. Lang, a witness who was discovered, according to what he said, over the week-end, or within a short time from the time he testified, perhaps less time than that, said that he was down at the Port, that he was on solid ground within seventy-five feet of this plane, when somebody whose

name he does not know brought to him two spark plugs. That was preceded by this unknown person bringing to an Italian and delivering to him a carburetor. He says this man then left where they were standing, went to the engine, and he saw him remove from that engine these spark plugs and bring them back, which he then examined with a flashlight. You will remember that Wtorkowski, being called to the stand after Mr. Lang, testified that spark plugs properly put in could not be removed with pliers, that it required a stiff wrench to take them out. You will recall also that there was testimony that at that time the solid ground northwest of where this plane cracked up was a thousand feet from the track. So it will be for you to say, in view of all the evidence in the case, whether it has been established to a reasonable certainty that he saw these spark plugs which Lang says he examined, if he did examine them, taken out of this engine, and if it has been sufficiently established that they were taken out of this engine.

Now, Mr. Kennedy, who examined this engine when it was brought to the Wright Aeronautical Company's plant, says that it was in first-class condition; that is, this plane had been operated 270 hours since its purchase, and he says that an examination of the parts of that engine indicated that it had been operated much less than 270 hours. He spoke of brass bushings. He says that six spark plugs from each engine were missing. There were eighteen spark plugs in each engine. He says that those which he examined were in proper condition.

Lang says that the trouble with these spark plugs was that they had too wide a gap, that the proper gap for spark plugs for use in that engine was fifteen one-thousandths of an inch, while these gauged thirty one-thousandths of an inch, the effect of which was to cause a pre-explosion, pre-ignition, and would heat up the engine and cause the engine to quit within ten minutes. Yet this plane, without any change that we have heard of in this case, had been operated on eight or nine flights that day.

Mr. Kennedy says that he tested those spark plugs, that they were standard spark plugs for use in that engine, that the standard gap was twenty to twenty-five one-thousandths, and that none of them exceeded that. Of course, you will remember the testimony of Mr. Conway, an expert produced here by the defendant, who testified that a proper spark gap was from fifteen one-thousandths to thirty one-thousandths for an AC spark plug for use in this J-5 engine.

There is no question, gentlemen, but that one or more of these engines failed. Has it been shown that it or they failed through any want of careful inspection or maintenance on the part of the defendant or its employees? Does the evidence show that the engines failed through any lack of inspection or foresight or care on the part of the defendant's employees?

You cannot guess at a verdict. Facts must be found by the evidence in the case. Chief Justice Depue, who occupied this very bench some years ago, or a bench in the court house that stood upon this site, was fond of saying to jurors in cases of this kind that you have no right to guess money out of one man's pocket into another's, which is tantamount to saying, just as I have told you, that you cannot guess at what happened. It must be proven to you by the evidence in the case.

How about the wind velocity? As I have already told you, the undisputed evidence is that the wind velocity was from 34 to 39 miles an hour. The danger of high wind, provided the wind be steady, admitted by all the experts who testified upon that subject, both for the plaintiffs and the defendant, is in the take-off; that a moderately high wind, a wind not exceeding 40 miles an hour, is no disadvantage after the plane has taken to the air; it may be an advantage. Mr. Chamberlin said that he thought that the limit of velocity of the wind in taking off would be 30 miles an hour; that is, taking off with a load of passengers such as this plane had upon it at that time.

But this accident did not happen in the take-off. Some of the witnesses have said that it was gusty, that this wind was gusty. In view of the fact that most of the evidence in this case—I do not say all of it, but most of it—indicates that this plane had flown a considerable distance before the

engines failed, can it be said that the greater weight of the evidence shows that the wind condition caused this plane to fall? That is a question for you gentlemen to determine. That is beyond the province of the Court. That is strictly within the province of the jury.

What had the number of passengers to do with it? There has been introduced in this case the license of this airplane which says: Seating capacity, exclusive of the crew, 12. Admittedly the crew in a 4-AT Ford plane of this type was two. So this license calls for a seating capacity of 12. We have also in evidence the design which is claimed to be the original design of this plane, in which unquestionably the seating capacity is 13.

The rule of the Department of Commerce, to which I have already called your attention, provides penalties for the carrying of passengers in excess of the original designed seating arrangement of the aircraft. This license to which I have called your attention provides for a gross weight of 10,130 pounds. That is, the weight empty and the useful load added together make the gross weight of the plane. Many of these experts who have testified say that there is a margin of safety over that 10,130 pounds under normal conditions, and that they themselves have carried loads, in one instance I think more than 3,000 pounds above the 10,130.

Mr. Lane testifies that he made up the proven figures in this case. We have the approximate weights of eight occupants of this plane. They amounted to 1,178 pounds. Counting 150 pounds each for the other seven, or 1,050 pounds, makes for the occupants of that plane, passengers and pilot, 2,233 pounds. Admittedly the weight empty of this plane was 6,169 pounds.

The fuel, according to computations made by Mr. Lane at 6 pounds per gallon, amounted to 942 pounds, that fuel which probably remained in the plane. It had operated for two and a third hours and it is figured that it consumed 36 gallons per hour for the three engines, making 84 gallons, and 3 gallons idling, making 87 or 88 gallons. They have allowed 88 gallons at 6 pounds. That makes 528 pounds. Deducting 88 gallons from the 245 gallons, which was a full load, leaves 157 gallons, which at 6 pounds to the gallon would make 942 pounds. If you figure six pounds and a half, as the plaintiff's witnesses say is the proper weight, you would have to add to that 79 pounds.

Now the oil, according to Mr. Lane, weighed 101 pounds. Those weights of the ship empty, gas and the oil, with the passengers and pilot, equal 9,445 pounds gross weight.

We are told that 100 pounds of tools were taken out. Another witness said they weighed about 50 pounds. That might be deducted from that gross weight if as a matter of fact, and as testified to, the tools were taken into the empty weight of the plane. But without taking into consideration the tools at all, that would leave a margin of 685 pounds of gross weight to make the 10,130, without taking into consideration any other margin of safety.

The plaintiffs' witnesses, the plaintiffs' experts, testified that it was unsafe in a plane licensed for 12 passengers to carry more than that number, without taking into consideration apparently the question of weight at all. That was their first testimony. But Mr. Chamberlin, who first testified that in his opinion it was not proper practice to carry more that that number of passengers, said that under favorable conditions the 4-AT was capable of carrying considerably above 10,130 pounds. Then he said, "I don't believe the number of passengers had anything to do with whether or not the plane was overloaded. I don't believe the extra passengers caused the crash. It may have caused the plane to land in a little different place."

Mr. Jones, Mr. Hawks, Mr. Balchen and others testified that in their opinion the number of passengers had nothing to do with the safety of this plane so long as the gross weight was not exceeded. Mr. Balchen said that the gross weight was the determining factor of safety.

Now, gentlemen, does the greater weight of the evidence show that the plane was overloaded? Does it show, if the license of the Department of Commerce was exceeded as to the number of passengers, that that so overloaded the plane or caused a danger which was the proximate cause of this collision?

Now we come to the question of the operation of the plane.

At that time there were certain rules of the airport, or rather, recommendations. They do not seem to be worded as rules. They are entitled, "Memoranda to all concerned; February 23, 1929." It says, "All take-offs and landings will be made on the designated runway at all times, and in no case will either take-off or landings be made across the same. After take-offs all aircraft will proceed straight ahead to a distance of at least 1,000 feet beyond the end of the runway being used where, if a turn is made, it will be made to the left."

Admittedly this was the rule of Mr. Aldworth, the Superintendent of the airport. Mr. Aldworth said with reference to that very rule that its purpose was primarily for uniformity. He says, "It is about an even break between a turn to the right or to the left, I should think a little better to the left, although there it is nearer to New York."

Mr. Chamberlin said that the safest turn is to the left because by turning to the left the plane remains over open territory and the pilot has better visibility if the pilot is on the left. That is his reason for that statement.

I cannot call your attention to all of the testimony, of course. You are to take into consideration all of the testimony whether it is recited by the Court or not when you come to consider this case.

All the experts who testify on that point for the defendant testify that it makes no difference whether you turn to the right or to the left.

Lieutenant Leahy, who is connected with the New Jersey National Guard as a Lieutenant of the Flying Corps, describes this flight, this take off. He was at the end of the parking space about to go out. He says that he saw this plane just over the road shown upon the map which you will have with you and which you have had through this case, and saw it cross the road at an altitude of 150 to 200 feet (I think 150 feet is the lowest altitude fixed by anybody when it crossed that road), that then the right wing dropped sharply, he indicated, between two and three inches beyond that road, and the scale of that map being 200 feet to the inch, it would be 400 to 600 feet. Then it went, he says, parallel to that road and slightly beyond South Street, and there it turned sharply to the right with the nose down, that the altitude wasn't much over 200 feet, and then the right wing went down, then the left, and then it went on an even keel for a while; and he says that the highest altitude was not over 200 feet at any time. He said that the first turn was a sharp and sudden turn and the second was sharper than normal.

Mr. Ingold, who, as I have already said to you, was the first or second witness for the plaintiffs, just as a witness for the map ahead of him, testifies that he saw this take-off and that the plane got to an altitude of about 500 feet and then started to slow down. Later he said this was 500 or 600 feet west of the viaduct. Other witnesses who testified to the altitude when the turn was made place it at from 250 to 700 feet when the turns were made. Mr. Foote himself says 500 to 600 feet before he commenced the turn, the curve. He says that after he had passed over this road some distance he made a gradual turn for 180 degrees until he was flying in exactly the opposite direction with a tail wind, that it was not until after he had made that final turn that his left motor quit and the center motor reved down. He says that he knew that he could not maintain his elevation, that he remembers the high power wires in front of him. He remembers seeing the fires on the dumps and knew it would be dangerous to set it down among those fires because of the danger of explosion and fire in his ship, and then he does not remember anything more until he woke up in the hospital.

A statement which was taken on the 19th day of March, two days after this accident, has been produced, which seems to correspond in some particulars with his testimony given in this trial, which apparently modifies it in others and in others contradicts him. Now, it is true that those statements made at that time are not proven facts in this case, but if taken under proper conditions they may be considered by you as bearing upon the correctness of the testimony which he gives in this trial of the occurrences, and as to whether or not the facts to which he testifies in this trial are now fully within his memory and recollection. When confronted with those facts Mr. Foote not only does not remember, he says, what he said upon that

occasion, but he does not remember that there was ever such an occasion. He does not remember that he ever had an interview with Captain Wetherdon and the representative of the Department of Commerce. He was badly injured. He had a fractured skull. He was unconscious when he was brought into the hospital. Both legs were fractured. He had a fracture of the arm, and he had a fracture of one of the processes of the spine.

One of the doctors who attended him says he regained consciousness. The other doctor says that also, that he regained consciousness in about three hours. One of the doctors, the doctor who attended the head injuries, says that he conversed normally the following day, that he was entirely rational, and that on the 19th, the day on which this statement admittedly was made (admittedly there was such an interview at that time), he thinks that he would remember, that his mental condition was such that he would remember occurrences. The other physician who attended his other injuries says that it was four or five days before his memory fully returned, in his opinion. A physician who makes a specialty of aviation cases appears here and says that with these head injuries it is frequently the case that, while victims of an accident of this kind are perfectly conscious, they are the victims of amnesia, which is loss of memory, that that loss of memory sometimes lasts for several days and sometimes never returns.

In determining the question of his mental condition you may take into consideration his testimony itself, which is in evidence in this case, in which at one time he speaks of the left motor going out, and at another time he asks whether it was not the right motor that went out and then evidently says that it was the left motor that went out, and at the very end of his testimony he asks the question of whether or not this accident, which admittedly occurred soon after the take-off, did not occur when he was coming back from New York and soon after he had passed over the Statute of Liberty. Now, as I say, if you find that he was perfectly conscious and had a memory for the events which occurred, embodied in his answers to those questions, then of course you may take them into consideration in determining the credit you will accord to his testimony here given; but they amount to nothing if it appear that he at that time, at the time he made those statements, was suffering from loss of memory and did not in fact recall the occurrences on that occasion.

In a hypothetical question as to the opinion of these experts called for both the plaintiffs and the defendant, these experts were asked their opinion of the care with which this plane was flown. In the hypothetical questions the plaintiffs' attorney assumed the minimum altitudes, or from 150 to 250 feet, when the turns were made, while those asked on behalf of the defendant assumed the maximum. So it may be important for you to decide the facts as to the probable height at which these turns were made if altitude had anything to do with the crash of the plane.

These experts, those noted flyers who have appeared here, did not see the accident. They are experts in flying and they were called upon by both sides to give you the benefit of their opinion of the care with which this plane was flown upon this occasion. The plaintiffs' hypothetical questions to these experts included conditions of the wind, number of passengers and turns, whether turns to the right or to the left were safe at the altitudes I have indicated.

I think the most noted experts perhaps who have been called in this case are McGee, who had had nine years' experience and who at that time had flown 2000 hours with 700 in tri-motor planes, and who at this time has had 3000 hours on tri-motor planes; Wells, who had flown almost all over the world, who had had thirteen years' experience, who was in the World War, who had had 8600 hours with airplanes; Chamberlin, who had had 6500 hours, who had been an aviator since 1918, who had flown from New York to Germany; Charles Sherman Jones, known as Casey Jones, who had had 5000 hours, was an ace in the army, and who had had fourteen years' experience with airplanes; Frank Hawks, who said he had been accused of being the speed king of America, who has had 9000 hours, the largest experience of any of them, and who had had fourteen years and

an army experience; Major Sutton, who had an army experience and who has had 1700 hours and 90 with tri-motors; and Balchen, who had had 2100 hours, 150 with tri-motors, who had flown across the Atlantic with Byrd and who had flown to the South Pole with Byrd. Now, these are some of the noted experts you have had before you.

Some of these experts, when having placed before them the conduct of the plane, the operation of the plane, as called for by the plaintiffs' hypothetical questions, indicating the minimum heights at which turns were made, the wind, the number of passengers, indicated that in their opinion the plane was not properly flown; but when confronted with the conditions claimed by the defendant, as I have already indicated to you, frankly stated that some of those conditions in their opinion had nothing to do with the crack-up of this plane. On the other hand, the opinion of the experts produced by the defendant, when confronted with the facts claimed by the defendant and included in the hypothetical questions, say that in their opinion this plane was properly operated; but when confronted with the facts claimed by the plaintiffs they frankly admit that sharp turns in that wind, with that number of passengers, at that altitude, was not good practice.

Then all of them, I think, who were questioned upon that subject, all of the defendant's experts, say that when confronted with an emergency such as confronted Foote at that time, the only safe thing was to go straight ahead and get the best landing he could. Mr. Jones says that forced landings occur notwithstanding a proper plane and proper inspection and care in operation. Others testify to the same, while one or two of the experts who testified for the plaintiffs say that under those conditions a plane will not crack up.

As to the competency of the pilot. That an incompetent pilot was operating the plane is not borne out by the evidence in this case. Even though you should find that he failed on this occasion to operate with such care as he ought, that alone would not justify you in finding that in employing him the defendant had employed and was permitting the plane to be operated by an inexperienced and incompetent pilot. The matter of whether or not he was negligent on this occasion is another question, of which I have already spoken.

I told you that I would mention another rule of the Department of Commerce, and that is the rule requiring all inspections to be entered in a log book and all operations of the plane to be entered in another log book. A great deal of time has been spent in this case in accounting for and attempting to account for certain missing log books, but, gentlemen, that is all a matter of evidence. The presence or absence at this trial of those log books had nothing whatever to do with the accident to this plane and whether or not their presence here would have refreshed the memory of witnesses, or whether it would not have, or whether it would have assisted us in this trial, can make no difference in your consideration and determination of this case.

On the subject of liability, gentlemen, I had in mind to speak more at length about the testimony of these experts, but I have already taken much more time than I thought the entire charge would take. So I am leaving that entirely to your recollection, assisted, as it has been, by the arguments of counsel in this case, without any further repetition by the Court.

Now, to sum it all up in a few words, the question which you are to determine is whether or not the preponderance of the evidence demonstrates that this accident was caused through any fault or neglect of the defendant or its employees which should and could have been anticipated and provided against by reasonable foresight and care. If the evidence shows by its greater weight that the accident occurred through the failure of the defendant to exercise such care as the law imposes upon the defendant, as has been explained in this charge, and that such failure was the proximate cause of this accident, the plaintiffs are entitled to your verdict. If the evidence falls short of convincing you of that fact, your verdict should be for the defendant notwithstanding the seriousness to these plaintiffs of this acci-

dent, in which event the subject of damages should not be considered by you at all.

At the outset of this charge I spoke of the effect of what we know as the Death Act, in England known as Lord Campbell's Act. On the subject of damages you are controlled by this act. It fixes the principles upon which damages are assessed in a case of this kind, not the amount of damages, but the principles upon which the damages are assessed, and that is this: that "in every such action the jury shall give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death, to the wife, surviving husband and next of kin of such deceased persons."

Now, you see that excludes all sympathetic damages, all damages for the loss of the society and comfort of these people killed in this accident, and limits you to giving to the people dependent upon such deceased persons—that is, their next of kin—what they have lost in money, in dollars and cents. That may seem rather heartless, but it is based upon sound principles, I think. It must be because it has stood the test of 87 years in the State of New Jersey. The principles upon which such damages are assessed has not been materially changed, and it is within the power of the legislature at any time to change those principles. So those principles are binding upon the Court and the jury.

The statute also provides that the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in proportion provided by law in relation to the distribution of personal property left by persons dying intestate.

With those rules in mind I shall now call your attention to the age, earning capacity, or rather the earnings at that time, of these deceased persons, the persons dependent upon them and the ages of such persons. The testimony is that all of these young people who were killed were in good health.

Gertrude Steever was twenty-one. She was earning $20 per week as a bookkeeper. Her next of kin were her mother, who was fifty-seven, and her sister, Miss Edith, who was earning $25 a week salary in her position at the Columbia National Irving Trust Company in New York.

Now, the question is in all of these cases not only how long the deceased person would have lived had this accident not happened, but how long that person would have contributed to the next of kin, how long the next of kin would have lived to receive those contributions. This young lady was unmarried. There was no evidence in the case that there were any prospects of marriage, although I think we may assume with every person of that age that there are always possibilities of that, in which event this $10 a week which she contributed to her mother might have ceased entirely.

And you may take into consideration all of the vicissitudes of life in considering all these cases, how long the deceased person probably would have lived, how long they would have continued to contribute to the next of kin, and how long the next of kin would have lived to receive such contributions, and how long in any event, even though they had not died, they would probably have received such contribution. You are helped perhaps as to the expectancy of life from the testimony of the expert from the life insurance company. In the case of Gertrude he tells you that the expectancy of life for Gertrude was 40.7 years, that the expectancy of life of the mother was 16.2 years, and that their joint expectancy was 14.8 years, the contribution there being $10 a week.

William Steever was 28. His mother was the same as in the preceding case, of course, 57; but in this case, although he was paying to his mother $10 a week board, she was not his next of kin and you have no right in this case to consider the mother as a next of kin of William Steever because, under the intestate laws of this State, he having a wife and daughter, the mother would not be entitled to any contribution. The wife's age was 23, the expectancy of his wife was 40.7, of William 35.7—the joint expectancy is 33 years, and it was agreed that the joint expectancy with the child, two

years of age, would be substantially the same. He contributed $25 a week to his wife. They were living apart at that time because of some financial difficulty. He was a clerk for Clark-Dodge and was earning $50 a week, but he received a bonus at the end of the year. In the previous year, 1928, his average income with the bonus had amounted to $68.50 a week; and that same position at the same salary in 1929, with the 35% bonus at Christmas, would have yielded $70.50 a week; and the wife received of that at that time, you will recall, only $25 a week.

William Ziser was 24. His father was 65. He had nine brothers and sisters, four brothers and five sisters, all married and between the ages of 24 and 45 years; and two daughters lived home. He kept house for the father and the other members of the family. The expectancy of William was 38.6 years, of the father 12.8 years, and their joint expectancy was 11.8 years. His average earnings were $36.62 as a carpenter, and he contributed, according to his father's testimony, $25 or $30 a week.

Ray Helmstetter was 24. He had a mother living in Germany who was 52 years of age. His expectancy was 38.6 years. The mother's expectancy was 18.3, and their joint expectancy was 15.7. He earned $35 a week putting glass in automobiles, and his tips amounted to $7 or $8 a week; and he sent to his mother every month—not a week, but every month—$35.

Stephen Hagymasi was 26. His father was 59. His mother was 57. His mother and father were both inheritors. His expectancy was 37.1; his father's expectancy was 14.9; his mother's expectancy was 16.2. Their joint expectancy was 9.5, to which should be added in the matter of survivorship one additional year, which would make 10.5. His earnings averaged for 1928, $39.79, and for the months of January and February, 1929, had been more than that per month, over $50. He was a printing press helper, and his father says that all of the money that he earned was given to him and he paid him back for his clothes and for his lunch and spending money $5 or $6 a week.

Now, in addition to his father and mother he had three sisters, all over 21, married and away from home, and one brother Andrew, 18.

Frank Hagymasi was 28. The expectancy of the ages of the father and mother I have already given you; and he had an expectancy of 35.7. Their joint expectancy was 9.2, and with survivorship on the part of the parents, 10.2. His earnings as a molder were $38.50, and his father said he gave it all to him and he gave him back, the same as he did with Stephen, $5 or $6.

Now, gentlemen, having determined, if you get that far in the case, to the subject of damages, in each of these cases the amount of which the next of kin have been deprived, because that is the rule, the deprivation of a reasonable expectation of pecuniary benefit, having determined the amount of which the next of kin have probably been deprived, taking into consideration all of the vicissitudes of life, by the deaths of these relatives, those amounts should not be the amounts of your verdicts if your verdicts be in favor of the plaintiffs. Those amounts must be discounted for the average time at the rate of interest which money earns at this particular time, not necessarily by the legal rate of interest, but by the rate of interest which money earns at this time. Then having discounted these amounts on principles similar to the discount upon a note, and deducting it from your first result, the balance should be the amounts of your verdicts.

Of course the subject of damages will not be considered by you at all until you have first determined the question of liability. If the question of liability be determined in favor of the defendant, the question of damages should not be taken up by you at all. It is only after you have determined, as I have already indicated to you, that the greater weight of the evidence shows that this accident occurred because of the negligence of the defendant, that you should take up for consideration the question of damages.

Now, there is one thing more I want to say before I conclude, and that is that this to me has been a very interesting case. It has been a novel case. It has been, I think, the most important airplane case in this country, I am told by a representative of the Department of Commerce who

is here—and in that department they keep a record of all the airplane cases in all parts of the country—that it has probably involved more important questions than any airplane case that has been tried in these whole United States. That emphasizes the importance of this case.

During this entire case, which has lasted three full weeks, the case has been conducted by the attorneys on both sides in the most able manner and with the utmost courtesy and deference to the Court, opposing counsel and the jury; and during my service here of more than twenty years it seems to me I cannot point to a single jury which has given more careful and intelligent consideration to a case in this court than has the jury sitting in this case, which is an assurance that in your consideration of this case and in your determination of it you will give it the same interest and earnestness as you have during the trial.

There is one other thing. I want to express my obligation to the Department of Commerce and especially to Mr. Kintz, who has come here as the representative of the Department of Commerce, for the assistance which he has given to me in this case by referring me to other airplane cases in the United States, to the laws of Congress relating to aviation, and to the rules and regulations of the Department of Commerce. He has been most helpful to the Court, and our associations, I think, throughout of those who have appeared here as the active trial counsel and as counsel who have been here to observe this case have been of the finest, and I shall always look back upon this case as one of the pleasantest I have ever tried, notwithstanding its serious character.

I have here several requests to charge which I hope counsel will look over. My voice is giving out a little bit, and so if there are any of them I need not treat with, that I have covered, it will be helpful if you will just relieve me of the necessity of treating with them. If I have not I will take them up.

Suppose I take up the plaintiffs' first. Are there any of those now that I have not covered?

(Mr. Carpenter): As far as I am concerned, I think you have charged all of mine that you intend to.

(The Court): I think you may call my attention to any that you want me to refuse.

(Mr. Carpenter): No, I want you to charge them all. I want you to do that.

(The Court): Suppose you tell me just which ones. Just wait till I finish with the plaintiffs' first. I will take up yours.

(Mr. Biro): I believe your Honor has charged them all.

(The Court): So yours are withdrawn?

(Mr. Biro): Yes.

(The Court): Now, then, take up yours.

(Mr. Carpenter): No. 16. I wonder if you purposely omitted that.

(The Court): No. 16?

(Mr. Carpenter): Yes. You see several of these questions you left to the jury, so we won't touch those.

(The Court): "The pilot, Lou Foote, was not chargeable with the care that an expert would be chargeable with. He is only chargeable, as a matter of law, with using that degree of care which a pilot of average care, skill, experience and ability would use and exercise under the circumstances of the time and place."

That is a correct request and I have no hesitation in charging that.

(Mr. Carpenter): No. 20. I think you in effect charged that, although not in the same language.

(The Court): Well, it is, "If the pilot, Lou Foote, at the moment his left engine stopped and his center engine reved down to the point where it had no power, used his best judgment in the emergency that was created, the defendant is not chargeable with negligence for such exercise of judgment, even though the jury may be of the opinion that had the pilot done something different in the emergency the consequences would not have been so severe."

I think I shall modify that. It is correct with the modification which I made, I think, when I charged that proposition in the main charge; and that is, unless the emergency was created by his own negligence and if what he did was what a reasonably careful and prudent man probably would have done under the same or similar circumstances.

(Mr. Carpenter): No. 12 I think I am entitled to have charged.

(The Court): That I decline to charge except as I have charged.

(Mr. Carpenter): Well, the others I assume you decline to charge and you will give me an exception.

(The Court): No, I have some of them marked to charge. That is the reason I wanted you to go over them.

(Mr. Carpenter): Those which you have declined to charge I will check with you if you have it before you. Nos. 2, 3, 6, 7, 8, 9, 10, 11, 12 except as charged, 13, 14, 15. No. 16 you have charged. Nos. 18, 21 and 22. I think you did not charge any of those.

(The Court): Well, I am not sure that I am going to do that.

No. 21 is, "The jury must disregard that portion of the testimony of Mr. Ingold which was on the question of insurance. There is no evidence in this case which would warrant the jury believing the defendant was insured." I have no hesitation in charging the last part of that, that there is no evidence in this case that the defendant was insured.

(Mr. Carpenter): Now, No. 22.

(The Court): "The presence of Parsons in the cockpit in the seat opposite the pilot, under the evidence was in no way a factor contributing to this accident." I charge that.

No. 23 I have charged, I think, several times.

(Mr. Carpenter): Have you charged No. 10?

(The Court): Well, the 10th is, "There is no evidence in this case that the fact that the pilot made a turn to the right, in the direction in which he was going, instead of to the left, was in any way a factor contributing to the failure of the engines of the plane and the necessity for a forced landing."

I think that is the fact in the case, isn't it?

(Mr. Biro): I did not get the beginning of that.

(The Court): "There is no evidence in this case that the fact that the pilot made a turn to the right, in the direction in which he was going, instead of to the left, was in any way a factor contributing to the failure of the engines."

Now, I think there has been testimony in the case that turns frequently result in slowing down the engines, but I don't recall any evidence in the case that a turn to the right will slow down the engines any more than a turn to the left. Do you?

(Mr. Biro): No, there was none.

(The Court): I will charge that.

(Mr. Carpenter): I suppose you have refused to charge the eighth and ninth because they are perhaps too binding?

(The Court): Yes, I decline to charge the eighth and ninth.

(Mr. Carpenter): I assume that you decline the sixth and seventh because you are leaving those questions to the jury?

(The Court): No, I decline to charge them except as I have charged

(Mr. Carpenter): No. 3.

(The Court): I won't charge that.

(Mr. Carpenter): No. 2 you decline to charge?

(The Court): Right.

(Mr. Carpenter): I think our minds are at one on what you refuse to charge. May I have an exception to your refusal to charge each of these requests to charge except as you have charged them?

(The Court): That will be noted.

I suppose I ought to make some comment upon No. 6.

"There is no evidence that the airplane in question on her last flight

did not have an adequate supply of fuel to carry her on her contemplated trip and return."

With reference to that, the uncontradicted testimony is that after the first flight that afternoon this ship was refueled to capacity, which was 245 gallons, and the expert evidence before us is that there had been used up 88 gallons in the flights that afternoon prior to this accident, which would leave 157 gallons in the tanks. The center tank held only 25 gallons, which would leave 132 gallons, 66 gallons remaining in each of the outside tanks. The evidence is that those outside tanks were turned on, that there was gas in the tanks after the plane crashed, and that there is nothing in the case which in any way indicated a lack of fuel, lack of gas, except the stopping of the motors themselves. I am willing to go that far.

(Mr. Carpenter): I am content. That is all I care for.

No. 15, on the assumption of risk. Do you want to charge that?

(The Court): No further than I have charged it. I have already charged that. I have charged that they assumed all the risk incident to airplane travel which could have been anticipated by them.

(The Foreman): Is all the admitted evidence and the data that is submitted here, or admitted, available for the jury when they consider this?

(The Court): All of the exhibits will be available to the jury. The testimony you are expected to remember. The Court is not permitted to have the testimony transcribed.

(Juror No. 9): How about these ages and the expectancy of life I did not copy those.

(The Court): That is why I had pads given to you all.

(Juror No. 9): I did not copy them, but I guess some of the others have.

(The Foreman): For our purposes in making the statement of our verdict, will it be desirable for us to have the names of the administrators?

(The Court): I think not, because in the two Steever cases the administrator is the same, and in the two Hagymasi cases the administrator is the same. I think for the purpose of accuracy it will be better for you to indicate the names of the deceased persons. Of course, you understand that in the event of a verdict for the plaintiffs you are to render six verdicts, as you are trying six cases; and in the event of a verdict for the defendant you may render one single verdict, which will apply to all the cases.

Are there any other questions?

(The Foreman): Bearing on the question of damages, I of course wish to avoid placing any emphasis on it, but I am simply preparing for any contingency that may arise. I have with me a copy of the interest of annuity tables that I have referred to.

(The Court): Is there any objection to their being used?

(Mr. Biro): Not at all.

(Mr. Carpenter): No.

(The Court): That is all right, Mr. Emery. I tried last night to get one at home and thought I had succeeded, but did not. I am very glad you succeeded in getting one.

(The Foreman): I have one other question along the same line. In connection with the pecuniary damages, should account be taken of the expenses of the next of kin on account of the decedent?

(The Court): I am very glad you asked that question because I did omit to say one thing which I ought to have said, but I will first answer your question. I suppose you mean the expenses of funeral and burial and things of that kind?

(The Foreman): I was thinking particularly of the cases where there would be board and lodging.

(The Court): Yes, that is what I am going to tell you about now.

In all these cases, for instance illustrating it in the Hagymasi cases where the father said that the sons gave to him all of their earnings and he gave them back $5 or $6 a week, more than that should be deducted because he had the expense of maintaining those boys. The law is so practical that

even the expenses of their maintenance should be deducted from what they turned over to their father in addition to what he turned over to them for their spending money and lunch money and things of that kind. In other words, everything should be deducted which does not mean pecuniary benefit to those who are entitled to the money. The real rule which you ought always to bear in mind is that what these plaintiffs are entitled to recover, if they are entitled to verdicts at all, is the deprivation of a reasonable expectation of pecuniary benefit which, in other words, means: How much have they been deprived of in dollars and cents, probably, by the death of these people?

Does that answer your question?

(The Foreman): Yes.

(Mr. Carpenter: It has just been called to my attention by Mr. Reed that perhaps there might be some confusion about the meaning of these tables. These tables that have been introduced are not an absolute table.

(The Court): Oh, no. I thought I told you that.

These rules of expectation are not absolute rules. You are not bound by them at all. You ought not to feel bound by them because you should take into consideration all the exigencies of life, all the probabilities of life. These people may have lived longer than the expected time, and they may have lived a very much shorter period than the expected time. Take into consideration their businesses and the present-day manner of living.

(Mr. Biro): The subject has been brought out, if your Honor please, about funeral expenses of the deceased.

(The Court): Oh, no. Funeral expenses are not to be included, of course, nothing of that kind. There should be nothing for sympathetic damages and loss of association, and no expenses relating to the funeral or anything of that kind.

Gentlemen, then you may retire.

(*a*) *Plaintiffs' Requests to Charge.*

1. The license of this plane, issued by the Department of Commerce, reads "seating capacity exclusive of crew 12." All testimony adduced tends to show that the crew consists of two persons. If you find, as a fact, that there were more than 14 persons in this plane at the time it made its last flight, it was in violation of the license issued by the Department of Commerce.

2. If you find that the Air Commerce Act of 1926 has been violated by the defendant, you may consider it as some evidence of negligence.

3. If you find, that pilot Foote made a sharp turn to the right at an altitude less than 250 feet and you further find that that was the direct and proximate cause of this accident, then you should return a verdict for the plaintiffs in all of the cases.

4. If you find, as a matter of fact, that Pilot Foote had insufficient experience in flying passengers with this type of plane, namely a tri-motored Ford 4-AT, then you should find a verdict against the defendant Colonial Western Airways, Inc.

5. If the defendant, Colonial Western Airways, Inc., did not exercise reasonable care in employing a competent pilot and failed to test the qualifications of the pilot before permitting him to fly the plane in question with passengers, then you may find that the defendant was negligent.

6. If you find, as a matter of fact, that the negligent piloting of Lou Foote created an emergency, he cannot excuse his subsequent acts upon the theory that he was confronted with an emergency.

7. That the defendant Colonial Western Airways, Inc., was as a matter of law, a common carrier of passengers for hire.

8. If you find that the defendant Colonial Western Airways, Inc., by its agents, servants and employees sold tickets and carried on as a business, the transportation of passengers, without discrimination, as long as there was room, and maintained scheduled flights, then the defendant was engaged as a common carrier of passengers for hire.

9. A common carrier of passengers is bound to exercise due care for the safety of its passengers.

10. The due care from a common carrier and its servants towards passengers in their charge is a high degree of care to protect them from dangers that foresight can anticipate.

11. By foresight is meant not knowledge absolute nor that exactly such an accident as has happened was expected or apprehended, but rather that the characteristics of the accident are such that it can be classified among events that without due care are likely to occur, and that due care would prevent.

12. If you find that any witness has testified to an untruth deliberately, then you may disregard his entire testimony.

13. If you disbelieve any portion of a witness' testimony on a material fact, you may disregard or disbelieve his entire testimony.

14. Where a witness who is also a party to the action has made material statements out of court, which are in conflict with his testimony, you have the right to consider his statements as an admission against interest.

15. You have heard the testimony of Mr. Salter, based upon the tables upon the probable length of life, but, of course, that table is only a general guide, based upon the average expectancy of life, and there are a great many elements which enter into your verdict in that respect or which should enter into it. The question for you to determine is, how long would plaintiffs' intestate have lived in the course of nature and contributed in a pecuniary way to the beneficiaries entitled to compensation under our statute. Of course, the plaintiffs' intestate might have lived longer than the tables provide and their earnings might have increased, and all these elements are for you to take into consideration and exercise your good judgment in determining and arriving at your verdict. If you render a verdict for the plaintiffs in each case, you must render your verdict in one lump sum for each of the plaintiffs for all of these elements of damage which have been outlined to you.

(*b*) *Defendant's Requests to Charge.*

1. Under the undisputed evidence in this case the pilot, Lou Foote, was competent and qualified to navigate a Ford 4-AT airplane carrying passengers on March 17, 1929.

2. There is no evidence in this case that the pilot, Lou Foote, was guilty of any act of negligence which was the proximate cause of the accident in question.

3. There is no evidence that the airplane in question was not properly inspected and properly serviced and cared for on and prior to March 17, 1929.

4. There is no evidence that the airplane in question was overloaded when she took off on her last flight March 17, 1929.

5. There is positive evidence in this case that the airplane in question was in fact not overloaded on her last flight March 17, 1929.

6. There is no evidence that the airplane in question on her last flight did not have an adequate supply of fuel to carry her on her contemplated trip and return.

7. There is no evidence that the failure of the left motor and the reving down of the center motor to a point where it had no power, was in any way due to the negligence of the defendant.

8. There is no evidence in this case that defendant's airplane on its last flight was flown in a wind of too great velocity, or in an improper wind.

9. There is no evidence that the velocity or character of the wind at the time the airplane took off on its last flight was in any way the proximate cause of the accident.

10. There is no evidence in this case that the fact that the pilot made a turn to the right, in the direction in which he was going, instead of to the left, was in any way a factor contributing to the failure of the engines of the plane and the necessity for a forced landing.

11. It is uncontradicted that the proximate efficient cause of defendant's airplane coming down was engine failure. There is no evidence that such engine failure was in any way due to any negligence on the part of the defendant.

12. The evidence before the Court and jury is that had there been a proper landing place into which the pilot could have piloted his ship when the engines failed, the pilot probably would have been able to bring his ship safely to earth even after the engine failed. The fact that there was no proper place available into which the pilot, in the exercise of due care, could put his ship down after the engines failed, was in no way due to negligence of the defendant.

13. The accident in question was due to causes over which the defendant had no control.

14. The accident in question was an act of God.

15. The several decedents assumed the risk of engine failure, vagaries of the wind and air pockets and the dangers of forced landings, that were not caused by any negligence of defendant.

16. The pilot, Lou Foote, was not chargeable with the care that an expert would be chargeable with. He is only chargeable, as a matter of law, with using that degree of care which a pilot of average care, skill, experience and ability would use and exercise under the circumstances of the time and place.

17. The mere happening of an accident, without proof of facts from which the violation of a duty due to the plaintiff's intestates may be legitimately inferred, does not constitute negligence.

18. The jury must return a verdict in favor of the defendant because there is no proof that the defendant was guilty of any negligence which was the proximate cause of the accident.

19. The defendant in this case was not an insurer of the safety of its passengers.

20. If the pilot, Lou Foote, at the moment his left engine stopped and his center engine reved down to the point where it had no power, used his best judgment in the emergency that was created, the defendant is not chargeable with negligence for such exercise of judgment, even though the jury may be of the opinion that had the pilot done something different in the emergency the consequences would not have been so severe.

21. The jury must disregard that portion of the testimony of Mr. Ingold which was on the question of insurance. There is no evidence in this case which would warrant the jury believing the defendant was insured.

22. The presence of Parsons, in the cockpit in the seat opposite the pilot, under the evidence was in no way a factor contributing to this accident.

23. The plaintiffs have the burden of proving, by the greater weight of the evidence that the defendant was guilty of negligence which was the proximate cause of the accident. If they have not sustained this burden then the jury must return a verdict for the defendant.

International Regulation

REGULATIONS FOR CIVIL AVIATION—GUATEMALA*

SEPTEMBER 5, 1929

CHAPTER I

CONCERNING AIRPORTS AND AIRDROMES

Article 1.—By *airdrome* is understood any land or expanse of salt or fresh water made ready for the departure and arrival of aircraft; by the

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latter term being understood all craft that can remain or navigate in the air. Airdromes may be private, civil or military.

By *airport* is understood any civil airdrome in which the necessary and auxiliary services for aerial navigation have been installed.

By *aerial station* is understood every place usable, in case of necessity, for the departure and arrival of aircraft.

Article 2.—Airdromes shall be classified as: for State use; for public use or general interest; and special or private.

Article 3.—Airdromes intended exclusively for military purposes, shall be owned by the State and be governed by the regulations issued by the Ministry of War.

Article 4.—Airdromes of general interest are those open to public use, and may be built by the State, Municipalities or other official entities or their organs, who can also accept the co-operation of private entities; but shall always be subject to regulation by the State as to their establishment and operation. Airdromes built by private persons in accordance with the terms of the concession, may also be open to public service, and be subject, as to their construction and use, to the same regulations, inspection and control of the State as are those of general interest.

Article 5.—Private or special airdromes shall be the object of special concessions exclusively to Guatemalan entities or persons, and be subject to official inspection and obligated to grant gratuitous service of arrival and departure to all the aircraft of the State.

Article 6. Airdromes of a maritime character shall observe in every respect the regulations of the seaports, and be subject to inspection by the General Administration of Aeronautics.

Seaports may be used as airdromes insofar as compatible with maritime navigation, and in accordance with its regulations. In this event, the authorities and entities shall exercise, as to aerial navigation, the special functions assigned to each in regard to maritime navigation; but, an aeronautical inspection shall, in addition, be established in those ports in which there is aeronautical activity.

Article 7. Aerial stations established by the Municipalities, and by official and private entities, may also be the object of concessions.

Article 8.—In time of war all fortuitous or emergency airports and airdromes shall be operated under the regime provided by the department conducting the war.

Article 9.—The grounds, works and means of communication devoted to the airdromes of the State and to those decreed as of general interest, shall be considered of public utility and be subject to the corresponding declaration in each case, and, if necessary, to forcible expropriation.

Chapter II

Concerning Aircraft

Article 13.—In time of peace, aircraft of any nationality which have been duly matriculated, shall have the right of transit over the national territory, providing they observe the provisions established in the present Regulations.

Article 14.—Aircraft of any nationality, their crews, passengers, baggage and cargo, when they find themselves over national territory, shall be subject

to the liabilities resulting from the existing laws, especially to those relative to aerial navigation in general, insofar as said laws apply to all foreign aircraft without distinction of nationality; to customs and other fiscal duties; to the prohibitions against imports and exports; to the transport of persons and things; to the public safety and order; and to the system of passports and sanitary regulations. They shall, moreover, be subject to the liabilities resulting under the general legislation in force, except where the provisions of the present Regulations are to the contrary.

Article 15.— Fuel and lubricants carried on board for the use of aircraft are free from import duties, with the exception of those which are delivered from the aircraft in national territory, or of those which it may use for other flights within the territory.

Article 16.—The Government of the Republic reserves the right to restrict or prohibit, provisionally, in time of peace, either entirely or partly, and with immediate effect, in case of exceptional circumstances, all aerial navigation over its territory.

Article 17.—Every aircraft which finds itself over a prohibited zone shall give the alarm signal provided in the Regulations on aerial navigation, and shall, moreover, land outside the prohibited zone, as soon as possible, at one of the nearest airdromes. The same obligation rests upon every aircraft to which a special signal is given apprising her that it is flying over a prohibited zone.

Article 18.—Aircraft shall be provided with distinctive markings, plainly visible and which make it possible to verify their identity during flight (markings of nationality and matriculation). They shall carry, in addition, the markings of the name and domicile of the owner.

Aircraft shall be provided with certificates of matriculation and navigability, and with all the other documents required in the country of origin for aerial navigation.

Article 19.—All the members of the crew, who perform in the aircraft duties which are subject in her country of origin, to a special authorization, must be provided with the documents required in the country of her nationality for aerial navigation, and especially of the regulation certificates and licenses.

The other members of the crew must be provided with documents accrediting their position on board, their profession, their identity, and their nationality.

The crew and passengers must be provided with the documents necessary in conformity with the laws in force for international travel.

Article 20.—The certificates relative to the conditions for flying, the diplomas of fitness and the licenses issued or approved in the country of origin of the aircraft or her crew, shall be recognized as valid, upon the same basis as the documents issued or approved in Guatemala; but as to the diplomas and licenses of the crews, they shall be recognized only for service upon aircraft matriculated in their own country. The permission of the General Administration of Aeronautics is necessary to make any exceptions to this general rule.

Article 21.—Aircraft engaging in cabotage traffic can be furnished with instruments of radio communication only after obtaining permission from the General Administration of Aeronautics. Said instruments shall be operated only by the members of the crews furnished with permits issued by the same Office.

The General Administration of Aeronautics reserves the right to issue regulations relative to the compulsory installation, for reasons of safety, of instruments of radio communication on board the aircraft.

Article 22.—Aircraft, their crews and passengers, shall not transport arms, munitions, noxious gases, explosives or carrier-pigeons, nor be furnished with aerial photographic instruments, without prior authorization.

Article 23.—Aircraft transporting passengers and merchandise must be provided with a nominal list of the passengers, and with respect to the merchandise, with a manifest giving the description of the quality and quantity of the cargo, as well as with the necessary customs declarations.

If, upon the arrival of an aircraft, any discrepancy is noticed between the merchandise carried and the aforesaid documents, the customs officials of the port of entry shall decide what they may deem most convenient in that regard, and give immediate advice thereof to the General Administration of Aeronautics. The carriage of postal merchandise shall be regulated by means of special agreements with the General Postal Administration, with the approval of the respective Secretary.

Article 24.—The competent officials have the right to visit and examine the certificates and other documents on board, as well upon the departure as upon the arrival of any aircraft.

Article 25. Airports open to the service of public aerial navigation, are accessible to all aircraft of whatever nationality, and they may likewise use the services of metereological information, radioelectric connection, and day and night signals. The fortuitous imposts (landing, harborage, etc., imposts) shall be fixed separately.

Article 26.—Aircraft arriving from abroad, must only land at, or depart from, one of the airports open to public aerial navigation, and which are classified as customs airports (with service of passport inspection), without any intermediate landing between the frontier and the airport. In special cases, the competent officials can authorize the departure to, or arrival at, another airdrome in which the customs formalities and passport inspection shall take place. The prohibition against intermediate landings is equally applicable to these special cases.

In the case of forced landing, or in the case provided for in Article 17, the Commandant of the aircraft, the crew and the passengers, shall observe the regulations governing aerial navigation, and the special regulations in force in matters of customs and passport inspection.

Article 27.—The national frontiers can be crossed only at the points that the General Administration of Aeronautics might have designated.

Article 28.—The jettisoning of ballast other than fine sand or water, is forbidden.

Article 29.—During a flight, only the materials or objects for the abandonment of which the General Administration of Aeronautics shall have granted special permission, can, aside from the ballast be jettisoned or abandoned in some other way.

Article 30.—The salvage of machines lost in the sea shall be regulated saving conventions to the contrary, by the principles of maritime law.

Article 31.—It is established, as to all questions of nationality arising from the application of these Regulations, that aircraft have the nationality of the State in whose registry they are duly matriculated.

If the aircraft belongs to a company, whatever the latter's character may be, it must comply with all the conditions required by Guatemalan law before it can be considered a national company.

CHAPTER III

CONCERNING THE COORDINATION OF THE USE OF THE NATIONAL AIRDROMES FOR THE VARIOUS AERONAUTICAL SERVICES

Article 32.—The airdromes of the State, whether civil, military, naval or of any other department of the Administration, which are not located in the vicinity of an airport, shall be opened to aerial navigation and traffic, official and private, upon the conditions mentioned in these Regulations, unless the requirements of the national defense, or of any other political or technical order, be opposed thereto.

For the information of aeronauts, the airdromes and airports that may be opened to public service, will be published in the *Official Bulletin* of the General Administration of Aeronautics.

Article 33.—The special or private airdromes which may be opened to the public service, shall be so also to the aerial navigation and traffic of the aeronautic services of the State, and gratuitously with respect to the arrivals, departure and shelter of airplanes and the remaining services, under the conditions which might have been decided upon when they were opened to the public service.

Article 34.—In the airports, as well as in the other airdromes of the State, or of private persons, open to the public service, the installations auxiliary to aerial navigation belonging to the airdrome, can be used by the air traffic, to the extent that such installations may be available, or any other for whose construction permission might have been granted, within the rules laid down in these Regulations.

In these same airports or airdromes can also be established, within their perimeter, or in adjoining lands of the State or of private persons, aeronautical services of all kinds, official or private, and factories or shops for the construction or repair of airplanes, but always after seasonable concession; each service to be independent of the others, and the flying field shall be used in common either in its entirety or in part, with due coordination in the use of the same and of the general installations of the airdrome.

Article 35.—The concessions to official aeronautical services, official or private, of permits for permanent or temporary installations, to which the foregoing article refers, shall be made by the Ministry to which the airdrome belongs, after report from the General Administration of Aeronautics.

The concessions to private persons or companies, to put up installations for use in air traffic, shall be made always by the General Administration of Aeronautics.

The request for a concession should always be accompanied with a complete project of the installations proposed, and of the use to be made of them.

Article 36.—In all the aforesaid concessions, there should clearly appear the length of their life, and compensation to be paid for the occupancy of the lands, if there were any occasion for it; the communications and auxiliary services of navigation to be established, conditions of their use, of the use of the common flying field, and of the general installations of the same.

Article 37.—In airdromes where there are installations or usufructs pertaining to different departments of aeronautics, or to private companies, within the compass of the autonomy, which each has in its interior organization and operation without other dependency than upon the service or entity to which they belong, they shall all be subordinated, with respect to the use of the flying field and of the general and special services, auxiliary to aerial navigation, to the coordination that may be established in that regard by the Chief of the Airdrome appointed by the General Admin-

istration of Aeronautics, and to the regulations governing the interior organization of the same and of the general organization of Aerial Navigation.

Article 38.—At all airdromes open to the public service, the tariffs approved by the corresponding authority shall be applied to aircrafts not belonging to the service of the State, or to foreign aircrafts on official mission.

Private individuals, owners of private airdromes open to aerial navigation, are bound to transmit to the General Administration of Aeronautics, for statistical purposes, the annual balance of the proceeds of the air traffic.

Article 39.—The Chiefs of the Airdromes of the State and of private ones open to aerial navigation, shall be regarded, for the purpose of the regulations and inspection of the aerial navigation and traffic, as delegates of the General Administration of Aeronautics, and must observe, with respect to the latter, all the obligations stipulated in the present regulations.

Article 40.—The foregoing provisions are applicable in every respect to the maritime, river and lake ports fitted out for hydro-aviation.

Article 41.—To insure the proper coordination and use of the national airdromes, every plan for new airdromes and auxiliary installations of aerial navigation, must be submitted to the consideration of the General Administration of Aeronautics.

CHAPTER IV

CONCERNING NATIONAL MATRICULATIONS AND CERTIFICATES OF NAVIGABILITY OF AIRCRAFT

Article 42.—No civil aircraft shall fly over Guatemalan territory or its jurisdictional waters, without being duly matriculated with the General Administration of Aeronautics; in possession of a certificate of navigability issued by said Administration; and having complied with all the requirements hereinafter mentioned.

Article 43.—The symbol of matriculation of the civil aircrafts shall consist of the letter L, assigned to Guatemala as its mark of nationality, and the letter G, as countermark, followed by a group of three capital letters of the alphabet, one of which, at least, must be a vowel.

As to aircrafts equipped with radio, the call-initials shall be assigned by the General Administration of Aeronautics, with due regard to the laws and international conventions in force.

Article 44.—The certificate of matriculation must state: the number of the certificate, the marks of nationality and matriculation, type and description of the aircraft, names and domicile of the manufacturer, construction serial number, name and domicile of the owner, usual airdrome of the aircraft, and tag of inscription in the registry of matriculation.

Article 45.—Every aircraft must carry, in a fixed and visible place, a metal badge, in which should be inscribed the name and surname and domicile of the owner, as well as the tokens of nationality and matriculation of the aircraft.

Article 46.—The certificate of navigability shall be issued by the General Administration of Aeronautics, after a technical inspection.

It must contain the number of the certificate; names, domicile and nationality of the owner; names of the manufacturer, marks of nationality and matriculation; type, serial and construction number; place of construction; class of the machine; number of planes, motors, and seats (plazas),

including the crew; classification to which the aircraft belongs; maximum length, width and height of the aircraft in flight posture; number of motors and their types, as well as the number of horsepower and revolutions per minute of the motor (ciguena) and of the propeller; hourly consumption of fuel and oil; type, mark, weight and diameter of the propeller (helice); weight of the aircraft when empty, including the water in the radiators (if any); total weight of the fuel and oil (tanks filled); weight reserved for the crew; cargo reserved for the equipment, exclusive of the radio instruments; weight of the radio instruments; authorized maximum profitable commercial cargo for passengers and merchandise, when the fuel tanks are filled; authorized total maximum weight and minimum number of passengers required. It must also be stated that the material used in the construction of the machine corresponds with the prescribed mechanical conditions; that it has been built conformably with the accepted rules of aeronautical construction, that her characteristics are those corresponding to her type, and the official or private inspection to which its construction has been subjected.

This certificate shall, in addition, have pasted upon it a side view of the aircraft, of the dimension of 9 x 12 centimeters.

Article 47.—The certificate of navigability must be renewed, after a new official inspection, every six months, and at any time the General Administration of Aeronautics shall so determine it, or whenever the aircraft has undergone any important alteration or repair that affects its structure, or that changes its essential characteristics.

Article 48.—The certificates of matriculation and of navigability will be issued upon the request of the owner of the aircraft, who must attach to his application information as to the life and customs, the sale's invoice or contract of purchase of the aircraft, statement of characteristics, certificate of tests during flight by a pilot with an international diploma (F. A. I.).

As to aircraft built in Guatemala: declaratory certificate of the manufacturer of her having been built in his factory, and whether or not the materials used are of Guatemalan origin.

As to aircraft manufactured abroad: certificate accrediting the payment of the Guatemalan customs duties, certificates of the former matriculation, and navigability, and the corresponding ship's books.

Article 49.—If the aircraft to be matriculated has been matriculated before in another country, proof must be submitted that it has been discharged in the foreign registry.

Article 50.—When an unmatriculated foreign aircraft comes to Guatemala by air route, to be matriculated in this country, it should be matriculated provisionally in the country of origin, with a marking consisting of LG and two additional letters.

Article 51.—Whenever a Guatemalan aircraft changes ownership, the new owner should request from the General Administration of Aeronautics, the issuance of the documents in his name, and to this end he should present a declaration of ownership, signed by the former owner, the certificate of matriculation and the last certificate of navigability.

Article 52.—The Chiefs of airdromes, the aeronautic officials, and the officials of other departments, shall not permit aircraft not possessing the customary certificates of matriculation and navigability, as well as the corresponding ship's books, to leave the ground.

Article 53.—The forms of all official documents for aircrafts shall be prepared by the General Administration of Aeronautics, and published in its *Official Bulletin.*

CHAPTER V

CONCERNING LOCATION AND MEASUREMENTS OF THE MARKINGS OF NATIONALITY AND MATRICULATION

Article 54.—(a) The markings must be painted: once over the lower surface of the lower planes, and once over the upper surface of the upper planes, with the top of the letters toward the front edge of said planes. They must also be painted on each side of the fuselage, between the wings and the empennage.

If the machine has no fuselage, the markings must be painted on the hull;

(b) The height of the markings on the planes of the wings and in the empennage, should be four fifths of the respective width of these planes; on the steering rudder, the markings should be as large as possible. On the fuselage and hull, the height of the markings should be four fifths of the greatest height measured at the narrowest part of the fuselage or of the hull in which the markings are painted;

(c) The width of the signs should be equal to two-thirds of their height; their thickness should be equal to one-sixth of the same height. The letters must be full ordinary type (blocks), all of the same type and of the same dimensions; and there should be between them a space equal to one-half of their width;

(d) When the markings of matriculation and nationality appear together, they should be separated by a hyphen of length equal to the width of the letter;

(e) The markings of nationality and matriculation shall be arranged in the best possible condition, taking into consideration the shape of the aircraft. These markings should constantly be kept clean and visible.

CHAPTER VI

CONCERNING INSTRUCTIONS FOR THE FOREIGN AERONAUT IN GUATEMALA

Article 55.—If the nationality of a civil aircraft desiring to fly over Guatemalan territory is that of a country having a convention with Guatemala in matters of aerial navigation, the clearance shall be issued to it by the Consul of Guatemala at the place of departure, in keeping with the established convention, but shall specify that the machine in question is not intended to serve a regular international air line in Guatemala, and shall also state the purpose of the trip. Aircraft of companies serving regular lines, duly controlled by the General Administration of Aeronautics, need not comply with the foregoing requirements.

Article 56.—If the nationality of a civil aircraft desiring to fly over national territory is that of a country not having a convention with Guatemala in matters of aerial navigation, it must ask permission through diplomatic channels, which may be granted subject to the following conditions:

(a) Observance of the prohibitions against flights over prohibited zones;

(b) Prohibition against carrying on board machines for aerial photography;

(c) That the aircraft the object of the permission, if equipped with installations of wireless telegraphy, submit, as to the use of the same, to the national regulations;

(d) That the said aircraft shall likewise submit to the national laws in force in matters of aerial navigation;

(e) That said aircraft requesting permission to enter into and fly over the national territory, shall not carry on cabotage air traffic;

(f) That the permission is good only for one month, not renewable, without the payment of customs duties;

(g) That they shall adhere to the itinerary laid down, and must justify any changes within the foregoing rules.

Article 57.—Aircraft belonging to military governments or devoted to official services, must always have, whatever their nationality, special permission obtained through diplomatic channels.

Article 58.—Whenever a foreign aircraft, without previous permission to fly over Guatemala, moors in territorial waters due to *force majeure,* and the repair of the damage is brief, the maritime authorities, in endeavoring to establish the truth of the causative force, shall be animated with a broad tolerance that will not interrupt aerial navigation, and shall take the measures that their minds suggest, in order that it may proceed with its journey, if preventive measures are not deemed necessary, giving notice of their decision to the General Administration of Aeronautics.

In cases of repetition, when the repair of the damage affords the time to ask for instructions, and when the aircraft (national or foreign) has moored in a prohibited zone, it should not be permitted to depart until the General Administration of Aeronautics has advised that permission has been granted.

CHAPTER VII

CONCERNING THE DOCUMENTATION THAT FOREIGN AIRCRAFT FLYING OVER GUATEMALA SHOULD CARRY ON BOARD

Article 59.—Every foreign aircraft coming to fly over Guatemalan territory, must be matriculated, the markings of matriculation and nationality must be painted on it, and carry on board the certificate of matriculation; that the personnel of the crew is duly authorized, and be able to exhibit the documentation probative of these authorizations, including the one of the wireless operator, if it has secured the permission to have the installation on board; carry on board the certificate of navigability of the aircraft in its country; the log-books with entries to date, conformably with the regulation form, according to its nationality; the consular clearance or diplomatic authorization in virtue of which it has been allowed to fly over Guatemalan territory; the manifest of the freight, vised; policy of aerial transport (bills of lading), if any, for the carriage of merchandise; list of stores, if there are any on board, and the passenger list, authorized by the police of the country of origin or by the Guatemalan Consulate.

Article 60.—The log-books must be kept for two years after the date of the last entry thereon.

CHAPTER VIII

CONCERNING SIGNALS

Article 61.—(a) An aircraft desiring to land during the night at an airdrome which is guarded, must, before doing so, fire a green rocket or give intermittent signals with a light or a projector different from the navigation lights. Furthermore, with the aid of the *Morse International Code,* it must reproduce by means of phonics or luminous signals, the group of two letters consisting of its letter of nationality and the last letter of its marking of matriculation.

(b) Permission to land shall be given it by repeating from the ground a similar call-signal, followed with a green rocket or intermittent signals given with a green lamp.

(c) A red rocket fired from the ground or a red light sparkling on the ground shall mean that no aircraft must land;

(d) An aircraft compelled to land during the night, should, before doing so, fire a red rocket or give a series of brief and intermittent signals with its navigation lights;

(e) When an aircraft in danger asks help, it should give, to that end, either simultaneously or separately, the following danger signals:

1.—The international signal S. O. S., given by means of optical signals or radiotelegraphy.

2.—The danger signal given by means of the flags N. C. of the International Code;

3.—The distance signal consisting of a square flag having either above or beneath it a ball or some like object;

4.—A continuous sound sent forth by any sonorous instrument;

5.—A signal consisting of a succeeding number of white rockets, fired at short intervals;

(f) To let an airplane know that it is in the neighborhood of a prohibited zone, and that it must change its route, the following signals should be used:

1.—During the day, three projectiles, fired at intervals of ten seconds, which should produce, each, when bursting, a small cloud of white smoke indicating the course which the aircraft should take;

2.—At night, three projectiles, fired at intervals of ten seconds, and which should produce, when bursting, white lights or stars indicating the course which the aircraft should take;

(g) To give an aircraft the orders to land, the following signals should be used:

1.—During the day, three projectiles, fired at intervals of ten seconds, and which should produce, each, when bursting, a cloud of black or yellow smoke;

2.—At night, three projectiles fired at intervals of ten seconds, and which should produce, when bursting, green lights or stars.

If, moreover, it is desired to prevent the landing of an aircraft other than the one alluded to, a flash of intermittent light should be directed at the latter, by means of a projector.

(h) In case the mist or haziness should make an airdrome not visible, the same can be pointed out by a globe acting as an aerial buoy or by another approved method;

(i) In case of mist or haziness or of much rain, be it day or night, an aircraft on the water should cause to be heard the following sonorous signals:

1.—If it is neither anchored nor moored, a sound at intervals of two minutes at the most, consisting of two calls of approximately five seconds long, with an interval of about one second;

2.—If it is either anchored or moored, the rapid sounding of a bell or of a sufficiently powerful gong, extended for approximately five seconds, at intervals of one minute at the most.

CHAPTER IX

CONCERNING THE GENERAL RULES OF AERIAL NAVIGATION

Article 62.—(a) Airplanes must always yield the right of way to balloons, captive or free, and to dirigibles. Dirigibles must always yield the right of way to balloons, captive or free;

(b) A dirigible which has no control over its course, must be regarded as a free balloon;

(c) When circumstances allow, the risk of collision with another aircraft may be foreseen by watching carefully the direction and tendency of the course followed by such aircraft. When neither of these two elements changes to any appreciable degree, a collision should be regarded as possible;

(d) The expression "risk of collision" comprises every risk of accident caused by the excessively coming nearer of two aircraft. Every aircraft

upon which the foregoing rules impose the duty to turn aside from another aircraft to avoid a collision, must keep at a sufficient distance from it, taking into consideration the circumstances of the moment;

(e) To observe the rules concerning risks of collision with a motor-aircraft, it should always maneuver, according to the rules established as soon as it apprehends that by pursuing its course, she would come at less than 200 meters from any part whatever of the other aircraft;

(f) When two motor-aircraft meet face to, or almost face to face, each must bear to the right;

(g) When two motor-aircraft pursue, respectively, routes that intersect, the aircraft seeing the other toward its right must yield the right of way to the latter;

(h) An aircraft that overtakes another should, in order to pass it, turn aside from the latter by steering its own course toward the right instead of (diving) descending.

If an aircraft approaches another pursuing an inclined course of more than 110 degrees over that followed by the other, and in such a position that none of the lights on the sides of the aircraft could be distinguished at night, it is to be considered as desiring to pass the latter, and no subsequent change in the route of the two aircrafts should be construed that the first one intends to cross the other, according to the judgment of the present Regulations, and will not relieve it of the duty to keep at a distance from the aircraft overtaken, until after the latter has been entirely left behind.

Since during day time the aircraft which passes by under the conditions aforementioned cannot always know with certainty if its route will be in front or behind the other aircraft, she must, in case of doubt, regard itself in the position of an aircraft that overtakes another, and consequently, should steer away from the route pursued by the latter;

(i) When the present Regulations require one of the two aircraft to yield the right of way to the other, the latter must maintain its initial route and speed. Nevertheless, when, as a result of mist or any other cause, the two aircraft find themselves so close to each other that, if the one in front were alone to maneuver, a collision could not be avoided, the aircraft overtaken should take the initiative in maneuvering in the most efficacious way to avoid the collision;

(j) Every aircraft required under the present Regulations to steer away from the route of another aircraft, must, as long as possible, avoid crossing it in front;

(k) Every aircraft pursuing an aerial route officially recognized must keep to the right of this route, as long as this is possible without danger to itself;

(l) No aircraft about to take to the air, either from the ground or from the sea, shall attempt to take off if there is any risk of collision with another aircraft on the point of landing;

(m) Every aircraft enveloped in clouds, fog, haziness or any other condition of poor visibility, should maneuver with caution, taking carefully into account the circumstances of the moment;

(n) Conformably with these rules, no sight should ever be lost of such risks of navigation and of collision, or of any other circumstance that might make it necessary to change her course in order to avoid immediate danger.

CHAPTER X

CONCERNING SPECIAL RULES FOR AERIAL CIRCULATION OVER OR IN THE NEIGHBORHOOD OF AIRDROMES

Article 63.—(a) In every airdrome, any airplane that might attempt to land at or depart therefrom, and which is compelled to make a turn, should, except in case of danger, make it toward the left, that is to say, in a direction opposite to the movement of the hands of a watch;

(b) An airplane leaving an airdrome should not turn at a distance of less than 500 meters from the nearest point of the perimeter, and if it turns, should do it pursuant to the rules established in the foregoing paragraph;

(c) Every airplane flying at a distance of from 500 to 3500 meters from the nearest point of the perimeter of an airdrome, should observe the rules of pilotage above laid down in paragraphs (a) and (b), unless it is at a height of more than 2000 meters over the level of the airdrome;

(d) Acrobatic landings at airports are forbidden. Airplanes are forbidden to engage in acrobatic maneuvers in the neighborhood of these airports, at a distance lower than 4000 meters from the nearest point of the perimeter of the airdrome, unless these airplanes keep themselves at a height of more than 2000 meters;

(e) In every airdrome the direction of the wind should be clearly indicated by one or more of the methods known, such as a landing T, sock, weathervane, smoke, etc. If there is no wind, a ball plainly visible should be hoisted on a post, and if there is a landing T, it should be made fast;

(f) Every airplane leaving from or arriving at an airport, should do so against the wind, unless prevented by the arrangement of the place, or except in the case when there is no wind. In the latter case, every airplane leaving or arriving, should do so in the direction indicated by means of an appropriate signal, or if there is a landing T, in the direction indicated by this T;

(g) If two airplanes approach an airdrome at the same time to land therein, the airplane at a higher level should maneuver to avoid meeting the airplane flying at the lower level, and, in landing, shall observe the rules above mentioned;

(h) Any aircraft attempting to land at an airdrome shall have a free road;

(i) Every airdrome should, in effect, be divided into three zones arranged as follows from the viewpoint of an observer facing the wind: The zone to the right shall be the zone of departure, and the zone to the left that of landing; and between these two zones there shall be a neutral zone. An airplane desiring to land must do so as closely as possible to the neutral zone, but shall place itself to the left of any other airplane that might have already alighted. After having lessened its speed or stopped rolling over the ground, the airplane shall move immediately to the neutral zone. In like manner, an airplane that ascends, shall do so as nearly as possible to the right of the zone of departure, but keeping itself well to the left of any other airplane ascending or on the point of doing so;

(j) No airplane shall commence to ascend until the airplane which has left the ground before it has completely departed from the airdrome;

(k) The rules in the present article shall apply equally in the airdromes at night; the airdrome shall be marked off with the greatest possible exactness, by means of red lights placed around its perimeter and on its impediments. The landing direction should be, as far as possible, indicated with a luminous T, or in its absence, with three white lights arranged, at the zone reserved for landing, in the form of an isosceles triangle, the base of which should be approximately 200 meters in length and its height, twice its minimum; the arrangement of the lights shall be such that the airplane should land by moving from the center of the base toward the lights of the opposite vertex; the base shall indicate the place where it should commence to touch the ground, and the vertex, the place beyond which it will not be prudent to go;

(l) No captive balloon, kite or moored dirigible shall, without special permission, ascend in the neighborhood of an airdrome, except in the cases foreseen in article 21;

(m) Appropriate signals shall be placed upon all the impediments existing at the airdromes, and as far as possible, over the permanent impediments dangerous to aerial navigation, in a zone of 500 meters wide around all the airdromes.

CHAPTER XI

GENERAL

Article 64.—Every aircraft maneuvering upon the water by its own means must observe the regulations established with a view to avoiding collisions at sea, and to this end shall be considered as a steam vessel; but shall carry only the lights specified in the present Regulations and not those required of steam vessels by the maritime regulations; and, moreover, shall not use the sonorous signals mentioned in the latter regulations. It will not be required to pay attention to those signals either.

Article 65.—None of the provisions of the present Regulations shall be invoked to relieve an aircraft, or its owner, pilot or crew, of the consequences of negligence, either in the use of the lights and signals, in the look-out service, or in the observance of the precautions required in the practice of aerial navigation in normal times or in the special circumstances of the case under inquiry.

Article 66.—None of the foregoing provisions shall be invoked as an excuse in case of an infraction of the special regulations established and duly published relative to the circulation of aircrafts in the neighborhood of airdromes or of other places; the observance of those regulations will be regarded as obligatory upon all owners, pilots or crews of aircraft.

CHAPTER XII

CONCERNING THE GENERAL PROVISIONS WHICH FOREIGN AIRCRAFT FLYING OVER GUATEMALAN TERRITORY SHALL OBSERVE

Article 67.—Foreign aircraft flying over Guatemalan territory must observe the rules concerning lights and signals, general and special aerial navigation, over or in the neighborhood of the airdromes, in force in Guatemala, which are the same as the rules adopted by the majority of the nations.

Article 68.—In addition to these main rules, also those which may be in force in Guatemala relative to aerial navigation, customs, transport of persons and things, public order and health, shall be observed.

Article 69.—An authorized foreign aircraft upon arriving in Guatemala and alighting at an airport or airdrome not the one of destination, should be dispatched in it if there is a Customs Office, and if there is none, she must file with the local authorities a declaration to the effect that the provisions of the Customs Regulations do not affect it in any way, or if it is affected in some way by these fiscal regulations, should so state it to the said authorities, and abide by their determination. It shall do the same in regard to the Police.

The foreign authorized aircraft which, while flying over Guatemalan territory, is compelled by *force majeure* to alight at a place other than the airport of destination, must report before the local authorities, from whom instructions will be received, and immediately advise the General Administration of Aeronautics.

CHAPTER XIII

CONCERNING PROHIBITIONS WHICH FOREIGN AIRCRAFT FLYING OVER GUATEMALA SHOULD OBSERVE

Article 70.—The jettisoning of ballast other than fine sand or water is forbidden during aerial navigation over Guatemalan territory.

The transport of explosives, arms and munitions; and acrobatic flying over cities or crowds, and during normal flying at a height less than what would allow landing outside the town or crowd in case of damage to the motor-propelling system.

Article 71.—Flying over prohibited zones is also forbidden.

Article 72.—When in compliance with Article 60 of the Regulations in force for foreign aeronauts in Guatemala, aeronauts who, while flying over Guatemalan territory, are compelled by *force majeure* to alight but not in the airport of destination, and who appear before the local officials, the latter, or their agents, shall observe the following rules:

(a) If the landing has taken place outside of an organized town, airport or airdrome, the act should be brought by all to the knowledge of the nearest police station or military garrison, and the Commander shall place the machine under custody and extend to it every possible aid, but shall allow it to continue its trip if the cause of the landing—which he shall seek to ascertain——is due to damage or the necessity of re-provisioning, which would reasonably take less time to repair or carry out than it would take the permission of the General Administration of Aeronautics to arrive;

(b) If the time delayed could be reasonably presumed to be longer than that which it would require to get ready, permission should be requested by telegraph from the General Administration of Aeronautics;

(c) In cases of repetition and landing at prohibited zones, the permission of the General Administration of Aeronautics should always be expected before allowing the aircraft to depart;

(d) The conducting of traffic operations without the intervention of the nearest Customs House should always be prevented.

(e) If the abnormal landing were effected at a military, naval or national airport or airdrome, the Chief of the establishment shall be the one to act, as has been indicated;

(f) The authorities or their agents interfering in the cases aforementioned, shall make an entry in the log book giving clearance to the airplane, and report to the General Administration of Aeronautics any consequences arising on account thereof, and the documentation with which the airplane was provided.

CHAPTER XIV

CONCERNING THE USE OF THE TELEGRAPH BY AVIATORS

Article 73.—Every telegraph station which, after closing hours, is requested by pilots of the air to transmit an urgent message, should open, and receive the telegrams tendered, pursuant to the following rules:

(a) The persons asking that it be opened shall make their identity known by means of the corresponding certificate, if they are military aviators; and if they are civil aviators, by means of the "brevet" or card of identification issued by the General Administration of Aeronautics;

(b) Any messages presented which are addressed to the military or civil authorities of Guatemala, or to the chiefs of the companies or entities in Guatemala, to which the airplane belongs, shall enjoy telegraphic franchise; but the private messages which the senders desire to transmit, as well as those of an international character, should be paid for;

(c) The station clerks, in addition to the transmission of the messages aforesaid, shall report in advance to the General Administration of Aeronautics, of the importance of the accident which brought it about, and shall give the details, if possible.

The entire personnel are earnestly recommended great zeal in complying with the foregoing, and are advised that every doubtful case should be resolved always so as to extend the utmost facilities to those needing the assistance.

Foreign Jurisprudence

A. FRENCH AERONAUTICAL CASES*

(1) Compagnie française des Messageries Aériennes v. Dame Violette Vve Carroll[1]

If the air carrier holds, in principle, to the contract which binds it to the passengers—the obligation to take them to their destination safely, no provision, even prior to the law of May 31, 1924, nor any public order, shall prohibit it from limiting its liability to accidents attributable to its personal fault, to the exclusion of those resulting from risks inherent in a mode of locomotion which has not yet reached its point of perfection.

It follows that the clause printed on the tickets given to the passengers and providing that the latter are carried entirely at their own risk, must not be considered as completely invalid from the fact alone that, in general terms, it exonerates the carrier from liability even for its own wrong or gross neglect equivalent to fraud.

The defendant company having invoked the clause in question, not in order to be discharged from the consequences of a personal fault, but to escape the liability which might result from the general principles of law, it was proper to give effect to the agreement of the parties to the extent that such was lawful.

DECISION

THE COURT:[2] gives default against the widow Carroll, according to Article 1134 of the Civil Code. Relative to air transportation, if the carrier holds, in principle, to the contract—the obligation to conduct the passengers to their destination, no provision, even prior to the law of May 31, 1924, nor any public order, shall prohibit it from limiting its liability to accidents attributable to its personal fault, to the exclusion of those resulting from the risks inherent in a mode of transportation which has not yet reached its point of perfection.

Carroll, having boarded a plane, in London, of the Compaigne Française des Messageries Aériennes, was a victim of a fatal accident caused by the fall of the plane into the sea during the crossing of the English channel on June 3, 1923. The Messageries Aériennes set up in bar of the action for damages brought by his widow, a clause printed upon the tickets issued to passengers which provided that they are transported entirely at their own risk—the carrier, in this regard, disclaiming all liability.

The contested decision, without otherwise inquiring if this clause had been conveyed, in the instant case, in a satisfactory manner to the knowledge of the traveler, confines itself to set it aside from the argument on the grounds that it is worded in such general terms that it tends to exonerate the carrier from liability even for its own wrong or of its own neglect equivalent to fraud, and that it is not fitting for the court to give judgment to a party on a stipulation so worded that it is invalid. But the clause in question was not invoked by the defendant company to free itself from the consequences of a fault which would have been attributed to it personally. It availed itself of the clause only to set aside the liability which, in ignor-

*Translated by Lorraine Arnold, Secretary-Librarian, Air Law Institute.

1. Cour de Cassation (Ch. Civile) May 12, 1930. Reported in Droit Aérien (July-Aug.-Sept., 1930) p. 563.

2. Part of the opinion, naming counsel, is omitted.

ance of the causes of the accident, Mrs. Carroll expected to result from her count—from general principles of the transportation contract, either by reason of a presumed fault of the pilot or by reason of the risks of the air.

The appeal court was not authorized to refuse to give effect to the agreement of the parties, since it was easy to distinguish—following the legal issue that they intended to draw—that which was lawful and that which was held inoperative as contrary to public policy. Hence, it follows that the decree has no legal basis for its decision, and, for these reasons, it is quashed and annuled, but only in that which has been decided against the Compagnie Française des Messageries Aériennes by the decision rendered by the Court of Appeals of Paris on June 10, 1926, and sent to the Court of Appeals of Rouen.

(2) Widow Charrier v. Widow Amans[1]
Widow Amans v. Widow Charrier

Pilots are required to conform, even in the absence of regulation, to the unanimously approved principles of safety; and their liability must be established according to the rules of common law to which article 51, law of the 31st of May, 1924, refers.

Otherwise, the fault of the pilot must, in order to create liability, increase the normal and forseen risks of aerial navigation; and it is proper to judge it by taking into account the freedom of judgment the aviator must necessarily have, without being bound by imperative and absolute rules, to choose the means of salvage in case of impending peril.

With these conditions, the reserve officer pilot who, during a training flight, has taken on board a mechanic from an aviation center, cannot be considered at fault and in consequence held responsible for the death of the latter occurring in an aerial accident, since no rule prevented the departure of this mechanic and since the pilot has shown proof of courage and competence in the management of his machine after the breaking of the propeller of which he, himself, was not able to appreciate the seriousness.

JUDGMENT

THE COURT: According to the interlocutory judgment given by the Court of this bench, the 12th day of July, 1928, and the 19th day of April, 1929, together with the inquiries and appraisement which followed it. As the judgment of the 19th day of April, 1929, indicated, there was common fault of Charrier and Amans in taking the flight together in the same plane, having only one parachute, and against all rules and all instructions; further, it is established that Amans had no special authorization on this point, or the witness Verrion would have known it; and it is probable, as the expert, Captain Berlioz, said, that Amans might, in order to influence Charrier to come with him, use his personal influence and his title of President of the Aero Club, but that Charrier may have asked to take a place in the plane; further, in the doubt, it is proper to decide that, on this point, there is equal and common fault.

The widow Amans maintained that aviation carries special risks to which the aviator cannot be held as strictly as he would be in ordinary risks;

1. These two cases were decided in the Tribunal Civil de Montpellier, Nov. 8, 1929, and in the cour d'Appel de Montpellier, July 1, 1930, respectively. Reported in Droit Aérien (July-Aug.-Sept., 1930) pp. 565-570.

whereas, particularly he who out of good will takes a place in a plane knows very well that he runs special risks and that he remains responsible for them; but Amans, in admitting a passenger committed a fault so much more grave that he also ought to have known those special risks and in consequence was as much to blame as Charrier, in admitting the latter; otherwise, this existence of particularly grave risks should have obliged Amans to do all that was necessary to avoid them; especially to know the rules and to respect them, as well as the instructions from the chief of the aviation center. It has been pleaded in the name of the Widow Amans that there was no bond between the presence of Charrier in the plane and the accident which followed; whereas, it is certain that the presence of Charrier had no influence in the fall of the plane, which was the cause of the accident; but whereas, it is evident that his presence had a close bearing on the accident which happened to Charrier, since it would be useless to say that if Charrier had not been in the plane, he would not have been killed at the moment of the fall of the latter. The part of the fault involving Charrier must be rated as one third of the indemnity which would be due to the heirs of Amans; whereas, the latter ought then to pay him only two thirds of the damages.

No one, not even the experts, can give the exact cause of the fall; and whereas, it may very well be that it was Charrier, as well as Amans, who had in his hands the controls necessary to handle and direct the plane, both may have made the false maneuvres, unduly, it is certain, but in fact, which are now blamed on to Amans alone. But that would be only a most vague and audacious supposition which, not only has no actual foundation, but even clashes with actual, grave, and concordant presumptions. At first it was forbidden to Charrier to give the least movement to the apparatus which was near him; whereas, this intervention would, in fact, counteract the action of the pilot and would bring a catastrophe; whereas, Charrier could not know and understand the necessity of abstaining from all intervention; whereas, otherwise one could not suspect that as soon as the danger appeared Amans would have neglected to guide the plane which was under his care, which would have established against him a grave fault; if his plane had been under two different controls at the same time, this situation would have been shown by a lack of regularity in the flight of the plane, being shown either by rapid movements in different directions or by the exaggeration of a movement in one direction, and the experts would have have failed to find in the testimony traces of this lack of cohesion.

The hypothesis proposed by the widow Amans is not entirely inadmissible, for Charrier had never learned how to fly, and in this way he would not have been tempted to intervene in this flight, since it would be necessary to admit that Charrier, against all rules, without knowing anything about flying tried to make a false major turn blamed on to Amans, for Amans wished to go straight ahead as the rules commanded him to do, and also that Amans did not insist on holding his plane in a straight course. It is very difficult for the widow Amans to blame Charrier for an intervention in the guidance of the plane when also she reproached him for not having tried to shut off the ignition.

From these considerations it shows that the responsibility in the control of the plane and for the faults which could have been committed in that control, devolve upon Amans who alone ought to have piloted the plane.

According to the investigation it shows that the breaking of the propeller caused only an irregular vibration of the plane. This vibration induced the pilot to interrupt his flight; but this breaking is not the cause of the fall and could not have any influence on this fall. The experts declare also that the pilot could continue to rise only under the risk of increasing the vibrations of the motor and of bringing about a break therein; whereas, he then acted wisely in reducing the speed of his motor to diminish the amplitude of the vibrations; and this slackening of the motor prevented him from flying above the dangerous zone of 200 meters.

The principal charge against Amans, is to have tried to make a turn in order to land in the aviation field; whereas, it is shown in the judgment of the 29th of April, 1929, that in acting thus he acted against the rules especially expressed in the manual for army and navy pilots. Nevertheless the Court has admitted that, in certain special cases, especially where the landing is particularly dangerous if it is made in the direction of the flight, the fault consisting in turning is entirely theoretical; but that practically, it could not have been the cause of the accident or of the gravity of the latter and cannot be charged against the pilot; whereas it is in that state of mind that the Court asked the experts to determine if, in the case in point, some consideration opposed the landing straight ahead and justified the turn attempted by Amans. The experts answered this question as well as all the others with all the precision and all the authority which their standing as professionals gives them, and they assert certainly that if the plane had landed while flying in a straight line, it would have landed in the vineyards, which were not at all high in the month of December; whereas, almost certainly this landing would have caused some damages to the plane; whereas, they ran the extreme risk of being placed "en pylone"; but whereas, even if they had capsized, the accident would have been reduced to material damages (Lieutenant Fourrier); whereas, Amans would, all the more, have risked capsizing slowly without damages to the occupants of the plane(Captain Berlioz); whereas, Captain Berlioz made the further observation that Amans' fault was very well marked, for it was expressly commanded by the Chief of the field to all pilots in training to land straight before them, even in a vineyard in case of very marked motor trouble. It is of very little importance to know if the experts have qualified this fault as "theoretical" or "fault of pilotage." The fault would have remained theoretical if it had consisted in violation of the rules justified by practical considerations. The experts said there was not any consideration of this kind; whereas the pilotage fault is a practical fault; whereas, it is certain that this fault of Amans caused the death of two men and that it would be difficult to qualify as theoretical a fault having so sad a result.

The second charge made against Amans is that of not having cut off the ignition; whereas, the experts said that this precaution would have diminished a great deal the chances of fire without, nevertheless, eliminating them entirely and without, however, it being possible for the experts to determine the percentage by which the chances of fire were increased. The fire was the cause of the death of the aviators, of Charrier at least much more than the fall. All the witnesses who saw the plane after its fall saw that Charrier was living after the fall and was trying to get away from the flames; thus the fire was largely the cause of the death of Charrier; it was then a mis-

take not to have shut off the ignition, which would have diminished a great deal the chances of fire; the experts say although at the time of the fall, Amans was taken by surprise and he had not the time to make the necessary gesture to close the ignition; whereas this consideration is in itself very exact, but that the fall itself primarily was Amans' fault, in wishing to turn, since if he had tried as he ought to land straight before him, he could have, immediately and without haste, closed the ignition, but that he left the ignition turned on, because, say the experts, the pilot was hoping to use his motor to continue his flight toward the landing field; thus the first fault of turning produced at the same time considerable chances of fall and fire. However, one cannot reproach Charrier for not having tried, himself, to stop the motor and that, for the reason that during the turning of the plane it would have been acting against the plans of the pilot who alone had the controls and who, in order to turn about, had to keep the ignition turned on and that, during the fall, he could not have more time than Amans to proceed to this operation; the experts say, besides, with much force, that in any circumstance Charrier ought not to intervene. In consequence, that if there is common fault on the part of Charrier and Amans for having taken place in the same plane, the false handling of the plane which brought about the fall and the fire is entirely imputable to Amans, and that it is this false move which brought the fall and the fire.

Relative to the damage, Charrier was making 18 cents an hour, so in a normal day of eight hours, $1.44; except during a few days every month, he was working nine and even ten hours. One can admit that he was making $1.56 per day which would make a salary of $464 a working year of 300 days; whereas Charrier being only 26 years old, his yearly salary would have increased in proportion to his experience, and that he would arrive at a salary of $680 to $720 yearly. Whereas, thus the claim of $12,000 made by the widow Charrier is not exaggerated. Thus it has been said that the plaintiff has the right to the two thirds only of this indemnity, or $8,000.

For these reasons, the Court says that there is common fault between Amans and Charrier, since Amans, against all rules and against all prudence, admitted Charrier to fly with him in the same plane; says that the part of this fault which devolved upon Charrier ought to leave to the charge of his heirs a third of the damage which was caused by him; says that this loss could be estimated at $12,000, that the defendant owes to the widow Charrier and to her daughter by way of damages, the amount of $8,000 with interest levied from the day of the accident; sentences the defendant to the costs.

Decision

THE COURT: The parties agree to admit that the interlocutory judgment of the 19th of April, 1929, has definitely judged that the responsibility of the accident of the 9th of December, 1925, must be established according to the rules of Common law (art. 1382 Civil Code) referred to in art. 51 of the law of the 31st of May, 1924. Before the promulgation of the rules of 1927, the pilots were made to comply with the unanimously accepted principles of safety. To be responsible, the fault of the pilot must have increased the normal and foreseen risks of aerial navigation and must be estimated by taking into consideration the discretionary power that the aviator

must necessarily have, without being tied to fixed and absolute rules, in choosing the convenient means of safety in case of eminent danger.

Amans, officer of the experimental reserve, came on the 9th day of December, 1925, to the Center of Aviation of Montpellier-l'Or to make a training flight in a much used plane, supplied by the Center of Aviation, and took on board the mechanic Charrier, under conditions which it has not been possible to determine. It has been established by the inquest that this latter (Charrier) liked to fly and had often asked authorization from the Chief of the Center. No order opposing it had been posted, and Amans had obtained this authorization, and this practice was frequently followed by the reserve pilot officers. Amans had not infringed on any rule on this subject and it would be contrary to good sense, lacking a formal text, to refuse to mechanics the only good means of assuring the safety of the aviators in controlling the functioning of the motor during the flight of the plane. It is established that before the fall of the plane the witness Leydier had seen a piece from 40 to 60 centimeters long break from the propeller and fall to the ground. This rupture of the propeller had made a cracking noise heard by M. Verrion, Director of the Center, who was in his office, and had certainly influenced in a serious way the functioning of the plane, making a strong and abnormal vibration which obliged the pilot to interrupt his flight and to think of a means to avoid the danger which resulted from it. He must have diminished the speed of the motor, no longer being able to climb any higher, and was forced to land. The damage to the propeller and the necessary diminishing of the speed of the motor was probably the cause of the changing of direction that the aviator was not able to avoid, Being at a height of about 100 meters, admitting that Amans was master of the maneuvre, he was able to go straight and land in the vineyard or come back to the landing field by turning to his left.

It is quite easy to discuss after the event the expediency of the chosen maneuvre by the extent of the declared damage, but whereas, the pilot is much less well placed than the witnesses or the experts to judge immediately of the consequences of a propeller break of which he could not judge the gravity when the vibrations and the instability of the plane demand a quick decision. In the emergency, Amans had shown courage and competence in computing the probabilities and in trying a move dangerous, perhaps, but not forbidden in case of urgency and showing chances of safety by reason of the unbalancing of the plane by the motor, when landing in a vineyard would most certainly capsize the plane and probably burn it. The changing of direction was necessary or imposed by the instability of the plane, the ignition should not have been shut off in order to guard the possibility of a recovery. As soon as the fall had started, this move was impossible on account of insufficient height; and on account of the rapidity of the fall, the presence of only one parachute on board could not have had any influence on the consequences of the accident; and, in consequence, that no fault having been proved against Amans, his responsibility ought not to be sustained.

For these reasons, the Court, determining the appeal, and declaring unjustified the instant appeal, reverses the contested judgment, rejects as unjustified all the claims, pleas and motions of the widow Charrier, sentences her to the entire costs, and says there is no occasion for a fine.

(3) Cornillon v. Union des Pilotes civils de France, Etat (min. de la Marine) et Mingan[1]

1. Article 53 of the law of the 31st of May, 1924, declares a formal presumption of responsibility against the exploitant of aircraft having caused injury to others; this rule is applicable to military planes, or planes belonging to the State and to those which take part in a public meet, and there may exist exoneration or attenuation of this responsibility only in case of the fault of the victim.

2. The exploitant of the aircraft which has caused the injury must be considered as the association of pilots which has organized the meet, solicited the aid of pilots from aeronautical construction firms and from the military aviation interests, asked for and obtained the required permissions, taken all the necessary measures to insure the service of the order, made the program and given the necessary instruction for its performance, which has contracted insurance against accidents which might occur to third parties, fixed and received an entrance fee from the public, and taken all the receipts and paid all the expenses for that aviation meet.

3. When an accident has been caused by a Marine aircraft, the civil court is not competent to judge the claim introduced against the Minister of Marine or against the Second Master Pilot, insofar as he was in command. In case the pilot committed a personal fault, susceptible of coming under civil jurisdiction, it is the pilot association, and not the victim, which should bring suit. There being, in this instance, no legal relation existing between the former and him.

JUDGMENT

THE COURT: Jean Cornillon, acting in the name and as natural and legal guardian of his minor son, has summoned the Minister of Marine, the pilot Mingan and the Union des Pilotes civils de France, in judgment jointly and separately liable, to a claim for the payment of $12,000 as damages, for the reparation of the injury suffered after an accident befallen to the young Cornillon, when he was helping (the 27th day of May, 1928) at an aviation meet organized at Orly by the Union des Pilotes civils de France; on that day, toward 4:00 o'clock P. M., a plane belonging to the State and driven by the second master of Marine, Mingan, who was taking part in a landing contest, it being a part of the program of that meet, came to fall on the spectators placed along the course and injured the son of the plaintiff, when the propeller of the plane stopped.

1. Concerning the responsibility: Art. 53 of the law of the 31st of May, 1924, decreed a formal presumption of responsibility against the exploitant of the plane which has caused damage to others (see the report of M. Vallier to the Sénat, Jour. officiel, annex 473, p. 992, and that of M. Ripert to the Société d'Etudes législatives). This rule is applicable to military planes or to those belonging to the State (art. 2) and to those which take part in a public meet (art. 37). There would be exoneration or attenuation of this responsibility only in case of the fault of the victim, which was not here shown, or even alleged in the case in point. The Union des Pilotes civile de France must be considered by the law of the 31st of May, 1924, as the exploitant of the plane which has caused the damage: (1) because it organized the meet, as its statutes authorized in their art. 2; (2) because

1. Tribunal civil de la Seine (1st Ch.), Feb. 17, 1930. Reported in Droit Aérien (July-Aug.-Sept., 1930) p. 574.

it solicited the help of pilots from aeronautical construction firms, from the military air service, and accepted their collaboration for this meet; (3) because it asked for and obtained the permission required as much by the aerial navigation service as by the Prefect of Police; (4) because it took all the measures necessary to insure order and paid for them; (5) because it made the program of the meet and gave the necessary instructions for its performance; (6) because, for the event, it contracted with the "La Paix" company for insurance against accidents liable to be caused to the public; (7) because it received a fee from the spectators taking all the receipts and paying all the expenses for this aviation meet; whereas, as exploitant of the plane which caused the damage to others, the Union des Pilotes is entirely and by law responsible for the consequences of the unexpected accident.

It is an error that Cornillon has charged equally the Minister of Marine, and the Pilot Mingan. The court is incompetent to judge in the suit against the first and against the second, insofar as he was in command. If the latter has committed a personal fault, susceptible to civil jurisdiction, it is the Union des Pilotes and not Cornillon who ought to sue. In this case, there is no legal relation, in fact, between them and him.

2. Concerning the injury. There results from information furnished to the court and which it recognizes as sufficient, especially the report from Doctor Francais, appointed in the capacity of expert by order of the Court, that the young Cornillon was incapable of any work for a period of four months and that he suffered a permanent disability of 30%, on account of sight and nervous system troubles which affect him; whereas, taking into account all the elements of the case, especially the age of the victim, his profession, loss of earning power occasioned by the accident, the degree of disability, hospital expenses, and the replacement of ruined clothing, it is just to put the amount of indemnity which is due him at $2400.

For these reasons, the Court declares itself incompetent to judge in the suit against the Minister of Marines and Mingan, insofar as the latter was in command at the time of the accident; declares not admissible the demand against the said Mingan, insofar as this latter might have committed a personal fault; sentences for the above mentioned reasons the Union des Pilotes civils de France to pay Cornillon the sum of $2400 as damages; dismisses the parties for the rest of their motions; sentences the Union des Pilotes civils de France to the costs, excepting expenses relative to the suit against the Minister of Marines and Mingan which must be paid by Cornillon.

(4) Compagnie Aérienne Française v. Air Union[1]

The execution and the interpretation of the agreements concluded between the French Government and an aerial navigation company presents a jurisdictional question which is purely administrative and over which the consular department has no authority.

It is, on the other hand, validly called to pass judgment on the unfair competition which may be carried on even by a concessionaire, if this latter in the exploitation of his concession tries to encroach on the rights of others.

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1. This case was decided in the Tribunal de Commerce de la Seine, March 29, 1930. Reported in Droit Aérien (July-Aug.-Sept., 1930) p. 577.

But, granting that the principle of liberty of aerial navigation is so absolute that the government has not conceded any monopoly even to the aviation companies on the routes which it subsidizes, the fact cannot be qualified as unfair competition that an aerial transportation company exploits, aside from the services for which it receives a subsidy, some other services, authorized by the government and having special accounts submitted to financial inspection, when the said annexed services are made either for publicity or at the demand of groups guaranteeing a fixed sum for the trip, and when no inaccuracy nor any unlawful or unfair tactics are made during their exploitation.

JUDGMENT

THE COURT: The C. A. F. maintain and plead: First, that it is wrong, abusively and without right, that the Air Union Company, subsidized by the State, has undertaken and exploited flights above Paris and a Paris-Cherbourg service. Secondly, that the Air Union Company makes and has made against the C. A. F. illegal, illicit, and injurious competition. In consequence, the C. A. F. claim payment of damages fixed by the State and by provision at the sum of 200,000 francs ($8,000), and claim, in addition, that the Air Union Company should be forbidden to continue this competition under penalty of 5,000 francs ($200) for each stated infraction. Thirdly, they further claim that this Court, before deciding, should order an appraisement.

The Air Union Company maintains and pleads, on the first part of the claim, that, their being in question agreements passed on with the State of France, this Court would be incompetent; that, for the rest, aerial navigation being free, and the Air Union Company having made no act of unfair competition, the demand of the C. A. F. would have no grounds.

In reality, the C. A. F. base the first part of their claim on the fact that the Air Union Company, being subsidized by the State to exploit regular and steady aerial service, could not, in view of the agreements passed on between it and the State, exploit other services than those specified in the said agreements, and that it would be wrong, abusively, and without right, that the latter should undertake flights above Paris and the Paris-Cherbourg aerial service. This part of the claim concerns the execution and the interpretation of the agreements passed on between the State of France and the Air Union Company, and as there is a question of province and department purely administrative over which this Court has no authority. It results that it is necessary to declare inadmissible this first part of the C. A. F. claim.

Unfair competition may be carried on even by a grantee, if this latter in the exploitation of his grant, encroaches on the rights of others. If, during the time of its exploitation, the Air Union Company committed a fault (illicit, or illegal competition), it is just that the C. A. F., considering itself injured, apply to this Court. And there is illicit competition each time that, outside of all fraudulous intention, a person or a company commits acts of a nature to harm in some way a rival, acts having the character of an indiscretion, or of a fault. It is necessary under the circumstances, then, to examine whether the Air Union Company had committed, in the exploitation of the extra services, "flights above Paris" and "Paris-Cherbourg flights", other than those for which it is subsidized, an imprudence of a fault against the rights of the C. A. F.

It is proper to observe at first that the principle of liberty of aerial navigation is actually so absolute that the government has not even thought to concede to the subsidized companies the monopoly of exploitation of aerial routes, which it considers, in subsidizing them, must be compulsorily assured in the public interest. Thus, the Air Union Company possesses no monopoly and the aerial services for which it is subsidized by the State may be undertaken by any other company. If the C. A. F. maintain that a part of the subsidy received by the Air Union Company would be used by this latter in the extra services it has created, it does not bring to this Court any proof or commencement of proof in this regard. Otherwise the Air Union Company proves that for the said extra services for which it has obtained the State authorization, there was imposed on it a special account leaving the exploitation of these services completely outside the subsidized services and under the control of State inspectors. Besides, and on the Paris-Cherbourg line in particular, its ordinary rates are higher than those charged by the C. A. F. Also the Air Union Company surrounded itself with appreciable guarantees in this service, which it performed only upon the demand of the Transatlantic White Star Line, which guarantees it a minimum of 6,000 francs for each trip, regardless of the number of passengers. It is the same for the Marseille-Cannes service, which it has provided for some time upon the request of the management of the Casino de Cannes, and with a guarantee of 1,000 francs for each trip; whereas, it could not be a question of service with deficit at the expense of the subsidized services.

It appears clearly that the Air Union Company, as much in its service above Paris, called "Baptêmes de l'Air", and make for publicity to invite the traveler to use aviation, as in its Paris-Cherbourg service and its Marseille-Cannes service, guaranteed at the demand of the interested parties, the White Star Line and the Casino de Cannes, flights and services exploited independently of those subsidized, made use only of the liberty recognized for all, under the cover of the law and of the administrative rules, to use freely aerial navigation. During the exploitation by the Air Union Company in its extra service, there is found no inaccuracy nor any illicit or unfair moves toward its competitors. The C. A. F. bringing no proof, as it ought to do in its quality of plaintiff, of any unfair competition on the part of the Air Union Company, this latter part of its claim appears unjustified and must be rejected.

As for the subsidiary claim: It appears from what precedes that the facts of the case are sufficiently clear, there is no necessity to order an appraisement. For these reasons, the Court, judging in first instance and subject to appeal, declares the C. A. F. disallowed on the first part of its claim, and unjustified on the rest; to all pleas which it carries, overrules it and sentences it to the costs, even to the costs of the registration of the present judgment.

B. GERMAN AERONAUTICAL CASES*

(1) Judgment of the Schöffengericht in Liegnitz of April 28, 1926[1]

Promotors of a motorcycle race whose destination is the landing place of two balloons which are not under their management are not

*Translated by Carl Zollmann, Professor of Law, Marquette University School of Law.

1. Reported in 1 Zeitschrift für das gesammte Luftrecht 223.

subject to punishment under section 11 of the air commerce act because of the fact that the balloons make their ascent without the required license.

FACTS

On September 7, 1924, two balloons—the Breslau piloted by ..... and the Hentzens piloted by .....—which were owned by the local branch Breslau of the Silesian society for aerial navigation made an ascent from the Schlachthofswiese in Liegnitz. Both pilots had the necessary license. The balloons made a landing after flying only ninety minutes and at a place which was hardly 15 kilometers (eleven miles) distant from the place of ascent. A so-called destination race (Zielfahrt) was connected with this flight which was sponsored by the lower Silesian auto club, the new lower Silesian auto club and the Liegnitz motorcycle club. The destination of the motor vehicles was the landing place of the balloons. The chauffeurs of the first motor vehicles which reached the destination received prizes, there being separate prizes for automobiles and motorcycles. There was no common starting time or place for the participants in the race. Each participant determined the place, the time and the best way toward the destination. The pilots of the balloons had no instructions and were free to do as they pleased. The race was sponsored by the automobile and motorcyle clubs already mentioned and defendants E and B were particularly active in connection with the race. They had not obtained a license for the race.

DECISION

Defendants are not guilty.

The facts do not come within § 11 of the air commerce act of August 1, 1922. The air commerce act has reference to transportation by aircraft through the air. Since the simple flight of two balloons requires no particular regulation the facts all by themselves make an application of the statute impossible. The race is not to be considered as a public exhibition at which aircraft participated. It is true that the landing place of the balloons was the destination of the racers. Their purpose was merely passive—balloons without pilots whose flight in some manner is limited could have served the same purpose—but § 11 of the air commerce act presupposes an active participation by aircraft. It is true the competitors need not within the meaning of this section move, exclusively in the air, it being possible for aircraft to race with highway vehicles. But nondirigible balloons are least fitted to race with highway vehicles though airships and airplanes might do so more readily. In each case, however, there must be competition of the vehicles or their pilots. That was not the case here. The exhibitions were not for the purposes of satisfying curiosity (Schaulust) within the meaning of § 11 of the air commerce act. It is true that the balloon ascent and the race connected with it attracted many curiosity seekers. But this would be the case at a city like Liegnitz in accordance with present conditions at each such ascent. It was not the purpose of the sponsors to make up a program in connection with the ascent and the race to serve the purposes of the curiosity seekers. A different case would be presented if stunts, aerial sham battles, etc., had been presented. Nothing of this kind occurred. There was merely an ordinary balloon ascent. That it was announced in the advertisements of the Auto-Motor-Aerial Navigation Day does not change its char-

acter. The purpose was primarily propaganda namely to revive the local branch of the society for aerial navigation.

In accordance with the opinion of Professor Dr. Schreiber it must be held that the ascent and the race connected with it did not involve an exhibition which according to the air commerce act must be licensed.

The races did not involve competitive driving (Wettfahren) nor were themselves such competition. Since the balloons moved but slowly there could be no such thing in connection with the pursuing auto vehicles. Therefore there is no violation of the order covering the automobile traffic.

Defendants therefore are not guilty even so far as they were according to the testimony responsible for the race.

(2) Judgment of the Amtsgericht in Halberstadt of November 15, 1926[1]

A contract for the use of an aircraft with pilot which stipulates that the lessee is to pay a specified sum for flying the craft to and from the place where the exhibition is to be held but is silent on the question whether the lessee is to have the right to sell reservations for such flights to and fro does not confer on the lessee the right to sell such reservations.

FACTS

The corporation defendant in April, 1925, conducted a flying exhibition in Halberstadt and for this purpose rented from the plaintiff one of her machines with pilot. By the contract executed on March 30, 1925, defendant obligated itself to pay 1½ marks per kilometer—or 310 marks all told—for the costs of flying the aircraft to and from Halberstadt. It refuses payment of this sum on the ground that the aircraft was transporting employees of the plaintiff to and from Halberstadt on the day in question and thus precluded the possibility on defendant's part to sell such reservations. It claims that there is a custom in aerial transportation by which a renter has this right.

REASONS FOR JUDGMENT

The complaint is justified. According to §535 BGB. the owner is obligated to allow to the renter the undisturbed use of the res during the time stipulated for. The extent of this obligation, so far as it is not expressly regulated by the contract, must be determined according to the custom of traffic.

There is no doubt but that the contract in this case is silent in regard to this question.

Defendant contends that she has a right to sell reservations from and to the home port of the craft on general principles and in accordance with an existing custom.

The "Deutscher Luftrat" of October 11, 1926, denies absolutely that such a custom has any existence.[2]

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1. Reported in 1 Zeitschrift für das gesammte Luftrecht 234.

2. Berlin W. 35, October 11, 1926.
Deutscher Luftrat
Place of business in Aero Club of Germany
There is unanimity concerning the proposition that it is not customary in aerial navigation that aircraft chartered for particular occasions be at the disposal of the lessee. The latter therefore has no right to demand the

According to information received on July 2, 1926, from the Berlin chamber of commerce and industry[3] no definite custom in either direction has developed. According to this information a right to sell such reservations on general principles must be denied because according to the customs of traffic there are other usages in aerial navigation than in connection with surface travel.

The craft was rented for exhibition and passenger flights. It results from mere economic reasons that the owner will exact higher rent when the renter has the right to sell the reservations and the owner is deprived of the use of the craft coming and going and must transport its employees by other means at its own expense. Defendant therefore has the burden of proving that such higher rent has been agreed upon. Defendant does not even make such an allegation.

The rate of 1½ marks per kilometer is not according to the information received from the Berlin Chamber of Commerce and Industry to be considered as such higher rent.

(3) Judgment of the Strafkammer of the Landgericht Plauen of June 9, 1927[1]

1. A pilot may be guilty of undertaking to transport passengers by air without a license within the meaning of the air commerce act

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right to sell reservations to and from the place of exhibition unless the contract expressly so provides.

3. Berlin N.W. 7, July 2, 1926.
Chamber of commerce and industry at Berlin

In aerial navigation there is no custom to figure the price for a chartered aircraft only for the unoccupied machine or to permit to the lessee the use of the machine for passengers while it travels to and from the place of exhibition. Such a question therefore will have to be answered by referring to the express contract. The reason why the craft was chartered will be of some importance in this connection.

At aerial exhibitions a distinction must be made between exhibition flights, parachute jumping flights, and passenger flights. For exhibition flights there can be no question of passengers and for parachute flights only the parachute jumper will come into question. We mention this because the papers do not state the details of the exhibitions here in question. If passenger flights were in question special contracts for their participation would have to be made. Reliable information received by us would indicate that it is practically impossible to contract for the use of an aircraft without reaching a more express agreement concerning possible passenger flights. This is necessary from mere economic considerations on the part of the owner because he would charge higher pay if he is not to have the right to use the craft while it is taken to or from the place of exhibition. If he has such right he will frequently use the craft to transport employees and material to the place of exhibition and such seems to have been the case in the present case. The contract price thereby is reduced because it becomes unnecessary to transport such employees and material by other transportation facilities. The contract price of from one mark to one and eight tenths marks per kilometer does not impress experts as indicating that it was the intention of the owner to confer on the lessee the right to sell the reservations.

The lack of custom to which reference has already been made is due to the fact that air transportation companies follow the policy to meet the particular wishes of their customers as much as possible by express provisions in the contracts made with them.

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1. Reported in 2 Zeitschrift für das gesammte Luftrecht 52.

though such transportation is not very extensive nor according to a fixed schedule.

2. The activity of a pilot in undertaking circular flights for a compensation is not so strikingly personal that it cannot be brought under the designation of business.

3. A pilot who installs a second control stick in his plane for the purpose of allowing a particular aspirant for a pilot's license to get the feel of the motor while he begins the education of a pilot does not enter thereby on the education of pilots as a business within the meaning of the air commerce act particularly where no extra compensation is charged for the use of the stick.

4. An administrative order dealing only with the relations between various officials and not with their relations toward third persons and which is primarily intended for the air sentries is not a decree passed for the purpose of maintaining public order and security in connection with aircraft within the meaning of the air commerce act.

Defendant during the winter of 1926 to 1927 was the owner of a sport aircraft which was housed at the airport Syrau near Plauen. He had the certificate which is demanded by § 4 of the air commerce act of pilots of aircraft, but had no permission to educate pilots (§ 6 a.a.O.) or to transport persons by aircraft (§ 11 a.a.O.). He made his living and paid his expenses from the returns of advertising, flights, circular flights and photography flights. In the summer months he earned from 1500 to 1800 marks.

He repeatedly during the winter of 1926 undertook circular flights with passengers—about two or three weekly. In December, 1926, and January, 1927, he made such flights with H. T., a business man in Plauen. T paid him for each flight a sum which varied between 15 and 35 marks. T adjusted this compensation on the basis of the compensation established by the German Lufthansa, though going slightly under it. T also took defendant along on automobile rides or allowed him the use of the automobile belonging to T's factory. From other passengers defendant received 10 and sometimes 12 or 15 marks for a circular flight of from 6 to 8 minutes.

After a few flights with T defendant at the request of T, who had the amibition to become a pilot, installed a second control stick in the passenger seat for the purpose of letting T get the "feel" of it during flying. He knew that the schooling of pilot or the transportation of passengers as a business was subject to punishment.

In December, 1926, the Voglt. airport company transmitted to him the decree of the secretary of commerce (Reichsverkehrminister) of November 23, 1926 (L. 7. 7588/26). Despite this defendant allowed the witness T on January 3, 6, 8 and 11, to use the second control stick during a flight. T had no experience in connection with aircraft.

Reasons for Judgment

(1) According to § 32 Ziff. 5 in connection with § 11 of the air commerce act persons who undertake as a business to transport others by air without a license are punishable. The word undertake (Unternehmen) refers to a business undertaking, an activity which is prolonged and done for the purpose of gain, and is not for the purpose of promoting art of science. It is not necessary that the business be very extensive or according to a fixed schedule. Defendant for months undertook each week a certain number of circular flights with passengers and this was his intention from the very

beginning. The activity of the defendant in regard to circular flights therefore is not of such a strikingly personal nature that it could not be brought under the designation of a business. His very purpose was business. In each case he collected compensation. It is not true that the purpose of such compensation was merely to cover the expenses. The witness T testified that the purpose of the compensation was to cover cost of material, depreciation and value of time consumed. The ascertion of defendant that such flights were gratuitous therefore is not well founded. The word gratuity (Gefaelligkeit) means that time and material is furnished without compensation. That the compensation was not limited to covering costs is shown by the fact that its amount (15 to 35 marks) was nearly that fixed by the German Lufthansa for similar services. The court is of opinion that the conclusion that defendant did what he did as a business results even from his own statement that he undertook such flights merely in order to minimize the expenses resulting from the entire operation of his aircraft in all of its forms. According to his own statement his purpose in undertaking the circular flights was gain, temporary though it might be. It is of no importance whether the defendant used the money to support himself or to pay other expenses.

In connection with the question of educating pilots (§ 32 Ziff. 5 § 6 of the air commerce act) we agree with the trial court that the addition of the second control stick and the consequent circular flights were made to enable the witness T to feel out the motor. Such feel is according to the opinion of the expert witness Knofe the beginning of the education of a pilot. Therefore defendant began educating a pilot. But there is no proof that he did this as a business. Defendant's statement that he received no extra compensation for such education is correct. The fact that only a single student was involved makes it difficult to draw the conclusion that there was an intention to educate pilots for the purposes of gain. The facts being undisputed and clear a verdict of not guilty was not absolutely necessary.

(2) § 31 of the air commerce act makes it punishable to act contrary to the decrees passed for the purpose of maintaining public order and security in connection with aircraft. The trial judge ruled that the decree of the secretary of commerce of November 23, 1926, falls within this provision. This court disagrees with this conclusion. A decree within the meaning of § 31 is either a law in the formal sense of the word or a regulation. A mere administrative order which deals only with the relation between various officials and not with their relation toward third persons does not come within it. Such is the case here. This follows in the first place from the lack of proclamation. The order was communicated only to certain persons and officials. Its very words and its contents are not consistent with the contention made by the state.

I have communicated to all owners of aircraft, to all aircraft undertakings and to all flying schools the following disquisitions:

. . . A warning must be issued. . . . It must be considered as punishable lack of care (strafbarer Leichtsinn) . . . It is *expected* from each pilot . . . A pilot makes himself subject to an action for damages and runs the risk of being punished criminally under the provisions of the *strafgesetzbuch*. In order to cut down the number of mishaps I *request* all owners of aircraft.

This order was through the Saxon foreign ministry communicated to all air sentries.

On the whole it is clear that this order was primarily intended for the air sentries whose business it is to supervise the enforcement of the directions contained in it by pilots and owners. If it had been intended to refer to § 31 a direct reference to this paragraph would have been made rather than a reference to the Strafgesetzbuch.

It is necessary to acquit the defendant because he has not been guilty of a violation within the meaning of § 31.

(4) Judgment of the "grossen Strafkammer" of the Landgericht Liegnitz of November 10, 1927[1]

Promoters of a motorcycle race whose destination is the landing place of two balloons which are not under their management are not subject to punishment under Section 11 of the air commerce act because the balloons make their ascent without the required license.

The described performance at and near the Schlechthofswiese in Liegnitz on the afternoon of September 7, 1924, was public and balloons participated. The balloons, as contemplated, went up. Everybody could be a spectator because the balloons took off from a public street in Liegnitz. This was the intention of the promoters whose desire was that as many as possible should see it. All the citizens of Liegnitz had been invited expressly through an advertisement in the newspaper. The court does not assume that the performance was a "competitive" one within the meaning of the air commerce act (§ 11). This law as its name indicates was passed for the purpose of regulating air commerce and aircraft. If therefore competition (Wettgewerbe) is spoken of only competition between aircraft can be referred to or at the utmost such competition in which aircraft (aeroplanes, airships, balloons) participate. Such was not the case in Liegnitz on September 7, 1925. There was no competition between the balloons or their pilots. The landing places of the balloons were merely the destination toward which motor and other vehicles and pedestrians traveled. The prizes given to the pilots were merely honorary (Anerkennungspreise) rather than pecuniary (Wettbewerkpreise).

But the performance was an exhibition ("im Dienste der Schaulust"). The finding of the trial court that it was not the intention of the promoters by the balloon ascent and the race (Zielfahrt) to give an exhibition can apply only to the race and not to the balloon ascent. The public was attracted by the ascent since such an event is rare. It was made for the express purpose of providing something for the public to see. According to the statement of the defendant E the two balloons were imported from Breslau because just before September 7, 1924, a branch of the Silesian association for the promotion of aerial navigation had been founded in Liegnitz and the associates wished to gain members and create public interest. The purpose of the ascent was to gain such members by creating a desire on the part of the public to see the performance and by satisfying such desire. The ascent therefore was merely a public performance to serve the public desire for sensations (im Dienste der Schaulust).

1. Reported in 2 Zeitschrift für das gesammte Luftrecht 51.

Yet the defendants E and B are not guilty. According to § 32 Z. 5 Ges. anyone who undertakes a public performance with aircraft (Luftfahrtsveranstallung) within the meaning of § 11 without permission is subject to punishment. It is aimed against the promoter. The question is whether it is proved that the above named defendants were promoters. This must be denied for the following reasons:

The announcement for September 7, 1925, was concerning a motorcycle and aircraft day. Five societies participated in this invitation. The various performances were at different times and at different places in and out of the city. It should be stressed that Siegeshoehe, Fliekerhorst and Schlachthofwiese are kilometers apart, the city extending between them. Therefore there were a number of separate performances and the union of the five societies was only in regard to the announcement. Each society conducted the performance in which it was interested without assuming any liability for the performances of the other societies. The race (Zielfahrt) was sponsored by the automobile club of Lower Silesia and the Liegnitz Motorcycle Club, the ascent only by the Liegnitz branch of the Silesian Society for aerial navigation. This society, or rather its leading members, were therefore the only ones who were responsible for the ascent. It was incumbent on them to obtain the proper license since only their performance was covered by the provisions of the air commerce act. It is not proved that the defendants were leading members of the Silesian Society nor even that they were members of such society. The race was connected with the ascent only so far as the landing of the balloons provided a destination. But for that reason the promoters of the race were not promoters of the ascent, which was unlawful merely because it was undertaken without a proper license.

Since it has not been proved that the defendants have undertaken the balloon ascent they are not guilty of violating § 11, 32 of the Air Commerce Act.

(5) Judgment of the Schöffengericht in Essen of December 19, 1927[1]

A pilot of long experience who flies over an assemblage of people in a small old type plane at an altitude of 5 meters, at a low speed with a choked motor and with a companion in the plane who distributes chocolate samples is guilty of manslaughter when he loses control of the machine, nosedives into the assembly and kills a spectator.

On the fifth of June, 1927, extensive exhibition flights were held at the airport Essen-Muelheim. Defendant's employer ordered him to fly from Duesseldorf to Essen and to distribute pieces of chocolate from his plane over the airport, for the purpose of advertising the chocolate factory T.

When defendant started his aircraft at Duesseldorf he experienced motor trouble. The trouble however was presently eliminated and the flight to Essen was entirely normal. After landing at Essen defendant established contact with the agent of the factory in order to get the details of his proposed flight. He asked among other things whether the air police had sanctioned his advertising flight. The agent thereupon communicated with police lieutenant K who issued a license assuming that chocolate would be

1. Reported in 2 Zeitschrift für das gesammte Luftrecht 54.

distributed only over portions of the field which were not occupied by the mass of the public. The agent communicated this permission to the defendant without making it clear to him that he must not fly over the portion occupied by the public.

An entrance fee had been charged and the customers had been directed into a circle which extended all around the airport and in which they were standing in a number of closely packed rows.

Defendant was aware of the orders which the Prussian minister of the interior had issued in regard to such advertising flights and which aimed particularly to prevent all careless flying at a low altitude or over assembled masses of people.

After the defendant had made a number of solo circular flights outside of this ring during which he threw down the chocolate samples himself he accepted as a passenger F. W., a business man, who took a seat in front of the pilot's seat and undertook the distribution of the samples to the right and left. Starting with a height of about 100 meters defendant descended to a height of about 5 meters and had choked his motor considerably. He therefore did not have much speed though the wind was in his back and what speed he had was further reduced by the action of his companion W. who leaned forward and neutralized some of the effect of the wind. At this moment defendant whose intention was to fly over the ring of people from the outside of the ring at a sharp angle was exactly over the assembly. In consequence of his slow speed, his low altitude and the choked condition of his motor he was not able to reach the inside of the ring though he started the motor in full force and used the control stick. After he had traveled about 15 meters over the assembly the craft made a nosedive into the spectators and turned over. A 13 year old pupil was hit by the propeller and instantly killed and 7 other persons were more or less seriously injured and feel the effects to the present day.

The aircraft used by defendant was a small old model.

Reasons for Judgment

There is no doubt on the basis of the testimony that defendant during the fatal flight had reached an altitude of not more than 5 meters and was flying at such a height when he approached the assembly. It was negligence on his part within the meaning of § 222,230 StGB at such slow speed and such low altitude to fly over the assembly. He should have figured (and did figure) that under these circumstances (low altitude, slow speed, choked motor) he lacked the necessary control of the craft to prevent danger to the public in case of any irregularity occurring in connection with it such as a temporary failure of the motor to function. The flight over the closely packed space at a low altitude by itself is negligence particularly since a companion was in the plane and defendant had to figure that he might act in a "maladroit" manner. On the other side it is true that the purpose of the advertisement can be accomplished only when the chocolate is thrown out of the plane from a low altitude and over an assembly and that his employer was impliedly expecting him to do about what he did. It is further true that his companion was very "maladroit" and thereby cut down the low speed to still lower level. These facts, however, while they mitigate the offense do not exculpate the defendant.

Defendant's carelessness was the cause of the death of the pupil and the injury to the other seven persons. As an experienced flyer he should have foreseen such a result.

Defendant therefore is guilty of manslaughter (§ 222 StGB) and his offense is the more serious because he, as a pilot, had particular duties which he lost sight of. By the same negligence he caused the injuries within the meaning of § 230 StGB and this offense is also without mitigation for the same reason. One act caused both the death and the maiming.

C. NORWEGIAN AERONAUTICAL CASE*

(1) Borch v. A/S Fredrikstad Forenede Teglverker[1]

The directors of a corporation not yet registered according to statutory requirements are personally liable for the damage done by the crash of an airplane transferred to the corporation.

Owners of an airplane held liable for damage done to defendent's premises by crowd drawn by curiosity to see a crash.

Judgment was given for A/S Fredrikstad Forenede Teglverker against defendants Karl Borch, Axel Johanson, and C. Paulsen in the amount of 3,294 crowns in the nisi prius court in Tune, October 5, 1921. The decision was affirmed by the Kristiania Appellate Court with costs taxed against the appellant. Plaintiff now appeals to the supreme court.

The facts of the case are set out in the opinion of the lower court. The appellants have not urged in this court their contention that the airplane crash was an accidental occurrence for which no party can be held liable, nor have they urged that in this case a pro rata liability on the part of the appellants should be imposed.

The supreme court comes to the same result as the lower court, for essentially the same reasons. The deciding factor for imposing liability on the defendants is that they caused the trial flight to be made for the corporation to which the airplane had been transferred before the corporation had yet been registered. Therefore judgment is affirmed, costs to be paid by the appellants.

OPINION

August 14, 1920, the airplane, "Curtiss", fell on plaintiff's brick factory and caused damage to the premises. The airplane belonged to the organized but not yet (chartered) registered corporation, "Curtiss A/S" of which the defendants were the directors. Pursuant to an agreement with the president, Borch, an estimate of damages was immediately made, which fixed the amount at 3,294 crowns.

The party liable is the one for whose account the air traffic is conducted—following the general rule for dangerous enterprises. There can therefore be no doubt but that the law imposes it upon the owner. The defendants have urged that the pilot is the responsible party inasmuch as he conducted himself negligently and in violation of his orders.

*Translated by Henry Heineman.

1. Norsk Retstidende for 1925 (Norway).

It is clear, however, that the owner of the airplane cannot be freed from liability by the negligent conduct of the pilot; that is the general rule with respect to dangerous instrumentalities and it is the only rule which provides a sure remedy to the injured, and which is covered by the general considerations applicable to liability of principals. (Cf. motorlovens No. 34).[2]

The airplane, however, was no longer (as claimed by the defendants) the property of Axel Johanson, so the latter cannot be held liable for the damage. The machine was transferred to the "Curtiss A/S" at the organization meeting of this association. The association was, however, as has been previously mentioned, not at the time a real corporation, since it was not registered. There existed, on the contrary, an association, organized as a corporation, between the members, which, however, is subject to the general laws of unincorporated associations. See *Platou*: Selskabsret II, p. 82. The acknowledged rule of law is that all members of an unincorporated association are jointly and severally liable for the obligations of the association, but that a single member cannot without power of attorney bind the others as against a third party. This rule is also expressed in *aktielovens* No. 17, 2det led, which has reference to contracts made with third parties before the registration; this statute provides that for such contracts "those who have entered them are personally jointly and severally liable." The statute says nothing about tort liability, but the same rule would seem to apply; see also *lov om handelsregistre* No. 7, 2det led. Therefore, those members of the association who undertook or consented to the operation of the airplane are liable for the damage which occurred during the course of the operation. That the three defendants are in this position can be gathered from their own version of the case, and they are therefore jointly and severally liable for the damage. Whether the other members of the association are also liable, is not a question before the court.

Part of the damages claimed consist of 950 crowns for ruined bricks and pipes against which amount protest is made from the very beginning. This damage was partly caused by the assembling of crowds of curious spectators. The defendants have therefore agreed to pay half the amount, 475 crowns, in order to avoid dispute, and the plaintiff agreed to this on condition that immediate settlement be made. As far as this item is concerned, it may be doubtful whether the defendants are responsible for the damage which was occasioned by the congregation of people, since it may be debatable whether this damage is a sufficient consequence of the tortious act. The court finds, however, that such is the case; an airplane crash is such an unusual and conspicuous event, that it is a natural consequence thereof that people assemble to look, and that in so doing they cause damage to property.[3] The flying took

2. The code provision cited provides for liability on the part of the owner for any damage done by an automobile used by his permission.

3. Compare the language in *Guille* v. *Swan* (1822) 19 Johnson 381, 10 Am. Dec. 234, 1928 U. S. Av. R. 53, a New York case in which a balloon ascendant was held liable for damage done by spectators gathered at his ex-

place along the river Glommen, both banks of which are thickly built up; and the defendants have also failed to raise any objections to the item, "watch-keeping" in the statement of claim. The defendants are therefore ordered to pay the entire claim, 3,294 crowns.

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hibition, who broke into plaintiff's garden to aid or watch the descent of the ballloon.

> Now if his descent under such circumstances would ordinarily and naturally, draw a crowd of people about him, either from curiosity, or for the purpose of rescuing him from a perilous situation; all this he ought to have foreseen, and must be responsible for.

See also *Canney* v. *Rochester Agricultural Assn.*, 76 N. H. 603, 79 Atl. 517, 1928 U. S. Av. R. 105 (Fair association held liable for damages sustained by plaintiff who was injured by a descending balloon while travelling on highway) and *Sollak* v. *N. Y.*, State of N. Y., Court of Claims, Oct. 14, 1927, 1929 U. S. Av. R. 42 (The doctrine of *res ipsa loquitur* held to apply to a situation in which an airplane carried off the top of automobile in which plaintiff was travelling on highway).

But see a *decision of U. S. Comptroller General,* Oct., 1923, 1928 U. S. Av. R. 46 holding the government not liable for injury to fence and cattle due to a stampede of cattle occasioned by flying over and landing near field in which cattle was pastured.

The Uniform State Law for Aeronautics, 1928 U. S. Av. R. 423, now adopted by some fifteen states, imposes (sec. 5) absolute liability for damage done by airplane to property on land, and the statutes of most of the states who have not adopted the uniform code in its entirety carry the same provision. A Pennsylvania statute imposes liability according to the "law applicable to torts on land": Pa. L. 1929, Act. 317, Sec. 6; and Connecticut provides for compensation for negligent injury only: Conn. L. 1929, Ch. 253, Sec. 32.